(18)

No. 94-1471-CFX
Status: GRANTED

Title: Varity Corporation, Petitioner
v.
Charles Howe, et al.

Docketed:
March 6, 1995

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Abrams,Floyd

Counsel for respondent: Smith,H. Richard, Schmit,Robert J.

Ptn due 3-5-95, Sunday, rcd hand-delivered 3-6-95.

Entry	Date	Note	Proceedings and Orders
1	Mar 6 1995	G	Petition for writ of certiorari filed.
3	Apr 4 1995		Brief of respondents Charles Howe, et al. in opposition filed.
2	Apr 5 1995		DISTRIBUTED. April 21, 1995 (Page 2)
4	Apr 10 1995	X	Reply brief of petitioner filed.
5	Apr 24 1995		Petition GRANTED.
			***
7	May 25 1995		Order extending time to file brief of petitioner on the merits until June 23, 1995.
8	Jun 8 1995		Joint appendix filed.
9	Jun 23 1995		Brief amicus curiae of Chamber of Commerce of the United States of America filed.
10	Jun 23 1995		Brief amici curiae of Eastman Kodak Company, et al. filed.
11	Jun 23 1995		Brief of petitioner Varity Corporation filed.
18	Jun 30 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
12	Jul 21 1995		Brief amicus curiae of United States filed.
13	Jul 26 1995		Brief amicus curiae of National Employment Lawyers Association filed.
14	Jul 26 1995		Brief amici curiae of Central States, Southeast and Southwest Areas Funds filed.
15	Jul 26 1995		Brief amicus curiae of American Association of Retired Persons filed.
16	Jul 26 1995		Brief of respondents Charles Howe, et al. filed.
17	Jul 26 1995		Brief amicus curiae of Natl. Association of Securities and Commercial Law Attorneys filed.
19	Aug 8 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Eighth Circuit.
20	Aug 18 1995		Record filed.
		*	Original record proceedings U. S. District Court, Southern District of Iowa (6 BOXES--CONFIDENTIAL RECORDS)
21	Aug 28 1995		Reply brief of petitioner filed.
22	Sep 5 1995		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 1, 1995.(2ND CASE).
23	Sep 7 1995	D	Motion of respondents for leave to file a supplemental brief filed.
24	Sep 11 1995		CIRCULATED.
25	Sep 13 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
27	Sep 22 1995		Opposition of petitioner to motion of respondents filed.
28	Oct 10 1995		Motion of respondents for leave to file a supplemental brief DENIED.
29	Nov 1 1995		ARGUED.

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No. ① Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

OCTOBER TERM, 1994

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 6, 1995

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QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act ("ERISA") § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), permit individual ERISA plan participants and beneficiaries to sue on their own behalf for alleged breaches of fiduciary duty under ERISA?

2. When an ERISA-governed welfare benefits plan expressly reserves the right to terminate, amend or modify the plan, and when that reservation of rights is disclosed to plan participants and beneficiaries, may liability nonetheless be imposed under ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. 1993), for breach of fiduciary duty, where an employer fails to disclose its expectation that at some point in the future benefits will be terminated?

PARTIES BELOW

In the court below, in addition to the petitioner Varity Corporation, Massey-Ferguson Inc. was an appellant and cross-appellee. Massey-Ferguson Inc. has been merged into Varity Corporation and no longer exists as a separate entity, and accordingly, it is not named as a petitioner herein. Respondents in the court below (as appellees and cross-appellants) were Charles Howe, Robert Wells, Ralph W. Thompson, Patrick Mousel (on behalf of themselves and as representatives of a class of persons similariy situated), and John Altomare, Charles Barron, Alexander Charron, Charlotte Chiles, Anita Crowe, Ray Darr, Doris Guidicessi, Barnett Lucas, Robert Skromme, and the Estate of Walter Smith, individually.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1, the Court is advised that petitioner is a publicly-traded company with no parent company. Other than wholly-owned subsidiaries, petitioner's only subsidiaries are Hayes Wheels International, Inc., Kelsey-Hayes de Mexico S.A., Topy Kelsey-Hayes, Limited, Varity Risk Management Services Limited, Motores Diesel Andinos S.A. and Motores Perkins S.A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Varity Corporation ("Varity") respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case, filed on September 29, 1994, rehearing and suggestion for rehearing *en banc* denied December 5, 1994, and clarified on December 8, 1994.

OPINIONS BELOW

The opinion of the court of appeals is reported at 36 F.3d 746 and is reprinted in the Appendix hereto at 1a-21a. The

court's opinion granting petitioner's motion for clarification of its initial opinion is reported at 41 F.3d 1263 and is reprinted at 22a-23a. The district court opinions on post-trial motions (24a-115a) are unreported. A prior opinion of the court below in this case is reported at 896 F.2d 1107 and is reprinted at 116a-124a. The court's denial of rehearing and suggestion for rehearing *en banc* (125a) is unreported.

JURISDICTION

The opinion of the court of appeals of which petitioner seeks review was filed on September 29, 1994, and clarified on December 8, 1994. The court of appeals denied a timely petition for rehearing with suggestion for rehearing *en banc* on December 5, 1994. This petition is being timely filed within 90 days of that denial.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

Relevant portions of ERISA are set forth in the Appendix at 126a-149a, and are listed in the Table of Contents thereto.

STATEMENT OF THE CASE

Factual Background of This Action

This litigation arose out of the demise of Massey Combines Corporation ("MCC"), one of several farm equipment manufacturers that failed during the recession that devastated that industry in the 1980s, and the attendant loss of ERISA welfare benefits by its employees and retirees. MCC was created in May 1986 when Varity transferred a portion of the manufacturing operations of one of its wholly-owned subsidiaries, Massey-Ferguson Inc. ("MF") to MCC as part of a restruc-

turing. MCC offered employment and welfare benefits (health and other insurance coverage) to certain employees of MF on terms identical to those they had enjoyed while in the employ of MF. MCC adopted verbatim the MF benefit plans.

MF provided benefits to its employees pursuant to the MF Benefit Plan (the "Master Plan"). In Section 7.4 of the Master Plan, MF explicitly "reserve[d] the right, by action of the Board, to amend or terminate the Plan or Trust at any time . . . ." (9a)

In December 1983, MF announced a significant cut-back in benefits by changing coverage for employees and retirees to a Comprehensive Major Medical Plan effective January 1, 1984. MF issued a memorandum to all employees and retirees that described the new coverage. (*See* 150a-154a) That memorandum stated on its schedule of benefits in solid capital letters:

> "THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR [i.e., the company] TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES OF COVERED INDIVIDUALS AT ANY TIME." (154a)

In addition to having disclosed this reservation of rights in 1984, when it offered employment with MCC in 1986 petitioner distributed a letter introducing the new company. That letter affirmed that "pay levels and benefit programs will remain unchanged", but stated that "[e]mployment conditions in the future will depend on our ability to make [MCC] a success, and if changes are considered necessary or appropriate, they will be made."

On March 4, 1988, two years after its formation, MCC went into receivership in Canada and was forced to terminate all of its employees. MCC's receiver sent notice to all employees and retirees advising them that MCC had no funds to continue paying welfare benefits. (117a)

Procedural History of This Action

A. Initial Proceedings

On October 26, 1988, five former MCC employees initiated this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1988 & Supp. V 1993), as amended, in the United States District Court for the Southern District of Iowa. Jurisdiction was predicated upon 29 U.S.C. § 1132 (1988 & Supp. V 1993), as amended, and 28 U.S.C. § 1331 (1988). Plaintiffs sought (i) a permanent injunction ordering petitioner to provide a purported class of plaintiffs, consisting of retirees of MCC who had previously worked for MF, with lifetime welfare benefits; (ii) severance pay for certain former employees of MF who worked for MCC at the time it was placed into receivership; and (iii) punitive damages.[1]

Petitioner moved to dismiss the complaint, and plaintiffs cross-moved for a preliminary injunction with respect to the retiree plaintiffs' claim for vested welfare benefits. The district court denied the motion to dismiss and granted the motion for a preliminary injunction. The preliminary injunction was reversed by the Court of Appeals for the Eighth Circuit on February 15, 1990, and the case remanded to the district court. (116a-124a)[2]

[1] Plaintiffs alleged that MF and Varity were liable as alter-egos of MCC or as former employers.

[2] The Eighth Circuit held that "the mere fact that employee benefit plans continue in retirement does not indicate that the benefits become vested for life at the moment of retirement. No inference of an intent to vest can be presumed from the fact the benefits are retirement benefits." (120a) Because the plan documents at issue contained no promise of vested benefits, and contained a reservation of the right to amend or terminate the benefits, the court held that the retirees "are no longer entitled to these benefits." (121a)

B. Trial

The district court thereafter allowed two plaintiff classes (MCC retirees and former MCC employees seeking severance pay) and ten individual retirees (who had retired from MF prior to the formation of MCC) to proceed to trial in August 1991 on five legal theories: breach of contract, promissory estoppel, interference with protected rights, breach of fiduciary duty and fraudulent misrepresentation. After a seventeen-day trial, a jury found for plaintiffs on all claims and awarded plaintiffs almost $46 million, including $36 million in punitive damages. Judgment for $45,848,499 was entered on September 30, 1991.

C. Post-Trial Orders of the District Court

On March 26, 1993, the district court entered an Order (the "March Order") and separate Findings of Fact and Conclusions of Law (the "March Findings"). The district court struck entirely the punitive damage award, acknowledging that punitive damages are not available under ERISA. The court set aside the jury's award to the severance pay class on all claims, including breach of fiduciary duty, based on the governing plan documents. As to the retirees, the court dismissed their breach of contract claim seeking lifetime benefits pursuant to ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1) (1988). The court held: "For plaintiffs to recover under this count they must show a contract for lifetime benefits which cannot be terminated. They cannot make such a showing in the face of section 7.4 [the reservation of rights in the benefit plan]." (35a) The court also dismissed as preempted the retirees' claim of fraudulent misrepresentation.

The district court held, however, that the retiree plaintiffs were entitled to lifetime welfare benefits under three different legal theories. First, the court held that petitioner had breached its fiduciary duties in failing to provide lifetime welfare benefits, notwithstanding that the retiree plaintiffs

had established no right to recover such benefits under § 502(a)(1). Second, the court held that petitioner had violated ERISA § 510, 29 U.S.C. § 1140 (1988), which bars interference with the attainment of ERISA-protected rights. Finally, the court held that petitioner was equitably estopped under federal common law from denying the retiree plaintiffs lifetime welfare benefits.[3]

On April 21, 1993, petitioner timely filed a Notice of Appeal to the Court of Appeals for the Eighth Circuit. Jurisdiction was invoked pursuant to 28 U.S.C. § 1291 (1988).

The Opinion of the Court Below

On appeal, the court below affirmed the district court's March Order and March Findings, with some modification as to relief.[4]

The court rejected the retiree claims for lifetime benefits under § 502(a)(1), because the "language [of the plan] unambiguously confers on the company the right to amend or terminate the Plan." (9a) Nevertheless, the court affirmed the district court's finding of liability as to retirees on the grounds that petitioner had breached its fiduciary duties under

[3] In the March Order, the district court offered the retiree plaintiffs the choice of (i) a permanent injunction reinstating them into the MF Plan and "compensatory damages" totalling $779,007.00 (amounting to "actual expenses" borne by the retiree plaintiffs); or, (ii) $8,312,332.00 equalling "damages past and future"—in other words, the equivalent of lifetime benefits—awarded by the jury. On April 15, 1993, plaintiffs elected to take the jury's award of money damages.

[4] The award of compensatory damages for lifetime benefits (elected by the retiree plaintiffs) was set aside; substituted for it was the alternative that plaintiffs had not chosen, and which was not part of the judgment entered by the district court: monetary relief "in the nature of restitution" as well as an injunction reinstating plaintiffs in the MF benefit plan. (18a)

ERISA § 404(a)(1), 29 U.S.C. 1104(a)(1) (1988 & Supp. V 1993).[5]

The court held that plaintiffs were entitled under ERISA to assert claims on their own behalf for breach of fiduciary duty. The court found this right in ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), allowing participants and beneficiaries to obtain "other appropriate equitable relief". In its ruling, the court simply ignored the impact on this case of this Court's analysis in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 140-42 (1985), determining that ERISA establishes fiduciary duties for the benefit of plans and that breach of fiduciary duty claims can only be brought by a participant or beneficiary on behalf of a plan. The court of appeals adopted instead the reasoning of Justice Brennan's concurring opinion in *Russell*. 473 U.S. at 155. (*See* 13a-16a)

The court held that petitioner had violated its fiduciary duties to the retirees by misleading them as to the likely future financial viability of MCC. Since petitioner itself knew that "MCC had a negative net worth on the day it was created" (5a), and since " '[a]ll of MCC's officers . . . agreed that MCC's chances of survival were not good' " (6a), the court held that the failure to disclose those facts together with the failure to restate that, at some point in the future, the plan might be modified or terminated (4a-5a), was a breach of petitioner's fiduciary duties to plaintiffs. (12a-13a)

The opinion of the court acknowledged that plaintiffs could not recover lifetime benefits (or any benefits) under § 502(a)(1) because the plan terms unambiguously did not establish any such contractual obligation. The court did not dispute—or even so much as mention—that the reservation of the right to amend, modify or terminate the plan had been dis-

[5] The court did not reach the district court's findings of liability predicated upon interference with protected rights and equitable estoppel. (17a n.5)

closed in writing to employees and retirees in 1984 in an ERISA document, a fact found by the district court. (74a-75a, ¶¶ 90-92) Nor did the court mention the 1986 letter informing MF employees that "if changes are considered necessary or appropriate, they will be made." The court nevertheless held that petitioner's failure to disclose the likely future business prospects of MCC and to *redisclose* the reservation of rights previously disclosed (5a), went "beyond mere business decisions" and were breaches of fiduciary duty because they constituted " 'misleading communications to plan participants regarding plan administration . . . .' " (13a, quoting *Berlin* v. *Michigan Bell Telephone Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988)).[6]

A petition for rehearing *en banc* was denied, two judges voting to the contrary. (125a)[7]

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW PERMITTING INDIVIDUALS TO ASSERT FOR THEIR OWN BENEFIT CLAIMS FOR BREACH OF FIDUCIARY DUTY UNDER ERISA IGNORES THIS COURT'S DECISION IN *RUSSELL* AND EXACERBATES A SPLIT IN THE CIRCUITS

The court of appeals held that ERISA authorizes individual participants in an ERISA-governed plan to assert, under

[6] Plaintiffs filed a cross-appeal seeking reversal of the district court's order setting aside the jury's award of punitive damages, the jury's finding of liability as to the severance pay plaintiffs, the jury's finding that petitioner had breached its "contract" to pay benefits pursuant to § 502(a)(1), and the jury's finding of fraudulent misrepresentation. The court denied plaintiffs' cross-appeal in all respects. (8a-11a)

[7] Judge Hansen, one of the two judges who voted in favor of granting rehearing *en banc*, had concurred in part with and dissented in part from the panel's ruling. (19a-21a)

ERISA § 502(a)(3) (148a), claims of breach of fiduciary duty for their own benefit. (16a) In so holding, the Eighth Circuit ignored this Court's reasoning in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), electing instead to follow Justice Brennan's concurring opinion in that case. Following a decision of the Seventh Circuit that likewise ignored the thrust of the Court's *Russell* opinion in favor of that of the concurrence, the Eighth Circuit's decision exacerbates a conflict in the Circuits. The Ninth and Eleventh Circuits, following *Russell*, have held that individuals may only assert fiduciary duty claims on behalf of a plan, not themselves, while the Third, Seventh and now the Eighth Circuits, following Justice Brennan's concurrence, have held to the contrary.

As this Court has previously explained, fiduciary duty liability under ERISA is established by ERISA § 409(a), 29 U.S.C. § 1109(a) (1988) (147a). *Russell*, *supra*, 473 U.S. at 139. Section 409(a), entitled "Liability for breach of fiduciary duty," provides:

> "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good *to such plan* any losses to the plan resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title."

29 U.S.C. § 1109(a) (emphasis added).

In addition to establishing this fiduciary duty liability, ERISA provides a specific mechanism for its civil enforcement. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988) (148a), provides that "[a] civil action may be brought . . . by

the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."

It is common ground that participants in an ERISA plan—like the plaintiffs below—may assert a claim of breach of fiduciary duty pursuant to §§ 409 and 502(a)(2). *Russell, supra*, 473 U.S. at 140. It is equally clear—and the *Russell* Court so held—that such a claim may only be brought on behalf of the ERISA plan, not on behalf of the plan participants or beneficiaries themselves. This Court reasoned:

> "Petitioner contends . . . that recovery for a violation of § 409 inures to the benefit of the plan as a whole. We find this contention supported by the text of § 409, by the statutory provisions defining the duties of a fiduciary, and by the provisions defining the rights of a beneficiary.
>
> "[W]hen the entire section [409] is examined, the emphasis on the relationship between the fiduciary and the plan as an entity becomes apparent. Thus, not only is the relevant fiduciary relationship characterized at the outset as one 'with respect to a plan,' but the potential personal liability of the fiduciary is 'to make good *to such plan* any losses *to the plan* . . . and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan*. . . .' "

473 U.S. at 140 (emphasis in original).

In reaching its decision in *Russell*, this Court reviewed the several ERISA provisions establishing fiduciary duties. The Court noted that such fiduciary duties are set forth in ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (1988 & Supp. V 1993), entitled "Fiduciary Responsibility". 473 U.S. at 143. The Court specifically considered § 404—the section cited by the court below in this case as the basis for its finding a breach of fiduciary duty. (*See* 12a). Based upon its review of § 404 and

the other fiduciary provisions, this Court explained:

> "It is of course true that the fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan. But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest."

Id. at 142-43.

After reviewing the statutory provisions and the legislative history in detail, the Court noted "Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole," 473 U.S. at 142 n.9, and that:

> "A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary."

Id. at 142.

Because the plaintiff in *Russell* disclaimed reliance on the other civil enforcement provisions contained in § 502(a), this Court noted that "we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages." 473 U.S. at 139 n.5. The Court made clear, however, that its analysis of § 502(a)(2) cannot be divorced from the overall scheme of remedies provided by the statute: "[w]e are reluctant," the Court concluded, "to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979): '[W]here a statute expressly provides a particular remedy or

remedies, a court must be chary of reading others into it.' " *Russell, supra*, 473 U.S. at 146-47.

In his concurring opinion (joined by Justices White, Marshall and Blackmun), Justice Brennan criticized the Court's opinion because it "might be read as suggesting that the fiduciary duties imposed by ERISA on plan administrators for the most part run only to the plan itself, as opposed to individual beneficiaries." 473 U.S. at 151. Citing principles of the common law of trusts and "promotion of the best interests of participants and beneficiaries", *id.* at 158, Justice Brennan opined that § 502(a)(3) should be read to permit individual participants and beneficiaries to assert breach of fiduciary duty claims on their own behalves. *Id.* at 155.

The Court's reasoning in *Russell* was recently reaffirmed in *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063 (1993), a case that did consider the remedies available under § 502(a)(3). Because the plaintiff in that case brought the action on behalf of a plan, the issue raised here was not presented. Rather, the Court held that extra-contractual damages were not available to a plaintiff asserting a breach of fiduciary duty claim under § 502(a)(3). In *Mertens*, the Court rejected arguments similar to those expressed by Justice Brennan in *Russell*. As Justice Scalia recalled: "In *Russell* we emphasized our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.' " *Mertens, supra*, 113 S. Ct. at 2067 (quoting *Russell*) (emphasis in original). The *Mertens* Court specifically rejected the argument that a contrary result was necessary "in order to achieve the 'purpose of ERISA to protect plan participants and beneficiaries.' " *Id.* at 2071. The Court concluded:

> "There is . . . a 'tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs.' We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck."

Id. at 2072 (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981) and citing *Russell, supra*, 473 U.S. at 148 n.17).

In reaching its result below, the court of appeals read *Russell* so narrowly as to disregard its central message, choosing instead to follow Justice Brennan's concurring opinion. (15a) ("[w]e agree with the reasoning in Justice Brennan's concurring opinion in *Russell*"). The panel made no effort whatsoever to address the *Russell* majority's careful analysis of the ERISA provisions "defining the duties of a fiduciary" as well as the provisions "defining the rights of a beneficiary." *Russell, supra*, 473 U.S. at 140. Nor did the panel confront the *Mertens* Court's explicit rejection of the substitution of vague policy arguments for the text of the statute enacted by Congress. Instead, in contravention of this Court's reasoning in both *Russell* and *Mertens*, the court of appeals concluded that plaintiffs should be permitted to assert fiduciary duty claims on their own behalf under § 502(a)(3) because "a contrary holding would leave unredressed an egregious wrong." (16a)

In ruling that an individual could state a claim for breach of fiduciary duty on his own behalf, the Eighth Circuit joined with the Third and Seventh Circuits, which had previously ruled similarly in *Bixler* v. *Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993), and *Anweiler* v. *American Electric Power Service Corp.*, 3 F.3d 986 (7th Cir. 1993).[8] Two other circuits, however, have far more faithfully

[8] In *Bixler*, the Third Circuit cited as support the Sixth Circuit's decision in *Warren* v. *Society National Bank*, 905 F.2d 975, 978-83 (6th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991). The *Warren* court, however, considered the issue of whether monetary damages are available as "equitable relief" under § 502(a)(3), and did not directly address the issue raised here. The *Warren* court's holding was that the monetary damages claimed in that case were available under § 502(a)(3), a result now barred

applied the reasoning of the majority in *Russell* to hold that breach of fiduciary duty claims may not be brought on an individual's own behalf, but only on behalf of a plan.

The Ninth Circuit, in a series of decisions, has rejected arguments based on Justice Brennan's concurrence and has strictly adhered to the *Russell* majority's analysis of ERISA fiduciary duties. *McLeod* v. *Oregon Lithoprint Inc.*, No. 92-36928, 1995 WL 36112 (9th Cir. Feb. 1, 1995); *Horan* v. *Kaiser Steel Retirement Plan*, 947 F.2d 1412 (9th Cir. 1991); *Sokol* v. *Bernstein*, 803 F.2d 532 (9th Cir. 1986). In *McLeod*, the Ninth Circuit took note of the fact that the *Russell* holding was limited to §§ 409 and 502(a)(2), but concluded that the majority's analysis was applicable to breach of fiduciary duty claims brought pursuant to § 502(a)(3). *See McLeod*, *supra*, 1995 WL 36112, at *3 ("[W]e [have] extended the Supreme Court's holding in *Russell*, which was limited to section 409(a), 29 U.S.C. § 1109(a), to section 502(a)(3), 29 U.S.C. § 1132(a)(3), as well."). In *McLeod*, the Ninth Circuit rejected the very argument adopted by the court below in this case—that claims may be brought under § 502(a)(3) to remedy breaches of the fiduciary duties set forth in § 404(a) (144a). 1995 WL 36112, at *3.

Similarly, in *Horan*, the Ninth Circuit ordered the dismissal of plaintiff's claims under § 502(a)(3) for declaratory and injunctive relief based on breach of fiduciary duty. The court explained that "the plaintiffs fail to present a fiduciary breach claim if the only remedy sought is for their own benefit, rather than for the benefit of the Plan as a whole." 947 F.2d at 1418. Finding that the equitable remedies sought by plaintiffs "would only benefit the plaintiffs and not the Plan," the court ordered that the claims be dismissed. *Id.*

by this Court's subsequent decision in *Mertens*. More recently, the Sixth Circuit has observed in dicta that "[i]t is well-settled that fiduciary liability under ERISA arises in favor of the plan itself, and that plan participants may not seek to recover in an individual capacity." *Tassinare* v. *American National Insurance Co.*, 32 F.3d 220, 222 (6th Cir. 1994).

The Eleventh Circuit has ruled similarly. In *Simmons* v. *Southern Bell Telephone and Telegraph Co.*, 940 F.2d 614 (11th Cir. 1991), that court vacated a judgment in favor of a plaintiff on a breach of fiduciary duty claim because the claim was brought on behalf of the individual plaintiff, not a plan. *Id.* at 617. Although the claim was brought pursuant to § 502(a)(1)(B), not § 502(a)(3), the Court made clear its view that *Russell* should be read broadly to limit any claims for breach of fiduciary duty:

> "A cause of action for an ERISA fiduciary's breach of its duties arises under 29 U.S.C. § 1109 rather than § 1132(a)(1)(B), and § 1109 does not permit an individual beneficiary to recover damages for breach of fiduciary duty."

Id. at 617 (citing *Russell*).

This Court's review of the decision below is necessary to resolve this conflict between the circuits regarding the import of this Court's decision in *Russell*. The decisions of the Third, Seventh and Eighth Circuits threaten to render § 502(a)(2) and *Russell* itself superfluous. As *Russell* made clear, the remedy for breach of fiduciary duty that Congress provided in § 502(a)(2) was carefully limited so as to protect the interests of plans as a whole, not individual participants. Yet the decision below, and those of the Third and Seventh Circuits, now permit all fiduciary duty claims to be brought under § 502(a)(3). Under those cases, individual participants in plans who desire to assert breach of fiduciary duty claims may ignore §§ 409 and 502(a)(2) altogether and instead assert their claims for their own benefit under § 502(a)(3). This Court should grant *certiorari* to resolve this conflict and to reestablish the careful balance struck by Congress in the text of ERISA.

II.

THE DECISION BELOW CREATES NEW FIDUCIARY DUTIES AND LIABILITY BEYOND THAT WHICH ERISA IMPOSES, IN CONFLICT WITH DECISIONS OF THIS COURT AND OF FOUR CIRCUITS

The court below imposed liability in this action based on its conclusion that in failing to disclose to employees and retirees a pessimistic internal assessment of MCC's future business prospects and to redisclose to employees and retirees a previously disclosed right to terminate benefits, petitioner was acting not as an employer making "mere business decisions", but as an ERISA fiduciary making " '[[m]]isleading communications . . . regarding plan administration' ". (13a) The ruling is consistent with decisions of four other circuits which have opined that even though an employer does not act as a fiduciary in amending, modifying or terminating a plan, it does act as a fiduciary once it gives "serious consideration" or "intends" to implement any plan change, but then misleads employees by failing to disclose or misrepresenting to them the impending action. *See Berlin* v. *Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988); *Eddy* v. *Colonial Life Insurance Co.*, 919 F.2d 747 (D.C. Cir. 1990); *Vartanian* v. *Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994); *Mullins* v. *Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994).

These rulings—including that of the court below—directly conflict with decisions of four other circuits and rewrite ERISA to alter fundamentally the nature of the fiduciary duties it requires.

In *Young* v. *Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988), the court held that an employer did not act in a fiduciary capacity when it failed to "reveal that it intended to create a special severance plan for the divestiture" of one of its divisions. *Id.* at 1045. The defendant had unilaterally amended a severance policy to

the detriment of employees after deciding to sell off portions of the failing division. The defendant did not disclose the unilateral change in the plan nor its intention to rid itself of the division. The court reasoned that an employer "is permitted to act in a dual capacity as both the manager of its business and a fiduciary with respect to unaccrued benefits." *Id.* Although revealing the intended change of plan terms might have been "desirable", the court held there was no "legal duty" to do so. *Id.* Accordingly, the Seventh Circuit affirmed dismissal of the employees' fiduciary duty claim.

The Court of Appeals for the Fifth Circuit has ruled similarly. In *Borst* v. *Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), plan beneficiaries brought claims for fraud and breach of the fiduciary duty of loyalty under ERISA § 404(a)—the very provision upon which the court below relied in ruling that petitioner had acted in a fiduciary capacity—because their employer had stated repeatedly that upon consummation of a merger with another company, any new pension plan would "set aside assets of the [new plan] to provide sufficient reserves for then-existing retiree pensions." *Id.* at 1322. When the merger took place, however, the employer failed to set aside any specific reserves. The Fifth Circuit affirmed the district court's dismissal of the fiduciary duty claim, noting that a plan beneficiary is entitled to rely *only* upon a "written plan document as required by section 402(a)(1) of ERISA." *Id.* at 1323. Moreover, the court held that the employer's statements "were not shown to be made in its fiduciary capacity, as opposed to being statements of intended action in its corporate nonfiduciary capacity as plan sponsor or settlor." *Id.* n.28.

In *Lea* v. *Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990), the Court of Appeals for the Ninth Circuit ruled to the same effect. In *Lea*, plaintiffs alleged that an employer had breached its fiduciary duties in negotiating with plaintiffs' union to terminate a plan by failing to comply with promises to channel adequate benefits to several disabled employees

upon the plan's termination. *Id.* at 626. Plaintiffs alleged fraud and breach of fiduciary duty in the negotiation and execution of the termination agreement. The court rejected plaintiffs' claims and affirmed summary judgment for the employer because, in executing the termination agreement, the employer "did not perform fiduciary functions; its status as employer does not automatically make it liable as an ERISA fiduciary." *Id.* at 631. Citing the Seventh Circuit's decision in *Young, supra,* the court also held that the company was not "liable here for its role in negotiating the termination of the ERISA plan." *Id.*

Finally, in *Blaw Knox Retirement Income Plan* v. *White Consolidated Industries, Inc.*, 998 F.2d 1185 (3d Cir. 1993), plaintiffs alleged that the defendants had intentionally understated the amount of certain plans' unfunded liabilities in the course of the sale of certain of defendants' divisions. The court affirmed dismissal of fiduciary duty claims based on the transfer because "[i]n selling the unprofitable BK Divisions and structuring the transaction to include the existing pension plans, [defendants] were making a corporate business decision." *Id.* at 1189.

In these decisions, the Seventh, Fifth, Ninth and Third Circuits (in stark contrast to the court below and the Sixth, District of Columbia, First and Second Circuits) have explicitly declined to hold that an employer acts in a fiduciary capacity when it has decided to terminate benefits (or decided upon a course of action that will likely result in the termination of benefits), but fails to disclose or even misrepresents that information.

The decisions of the court below and of the four other circuits that have ruled similarly have upended ERISA by vastly expanding the nature of fiduciary duties owed to plan participants and beneficiaries by employers who also act as plan administrators. As this Court's *Russell* and *Mertens* decisions made clear in addressing fiduciary duties and liability under

ERISA, courts are strictly limited to enforcing what the text of ERISA *says—i.e.*, the provisions that resulted from Congress' careful balancing of competing interests. *See Mertens, supra,* 113 S.Ct. at 2072; *Russell, supra,* 473 U.S. at 148. Yet, citing the very same vague policy concerns rejected in *Mertens,* the court below reached beyond the text of ERISA to impose sweeping fiduciary duties on petitioner in an effort to find a remedy for what the court concluded was an "egregious wrong". (16a) The result of the court's effort finds no support in ERISA.

What ERISA does say is that

> "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . , or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988). (127a) Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (Supp. V 1993) (144a) requires any such fiduciary to "discharge his duties . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of" ERISA.

ERISA, however, treats employee welfare benefit plans (which are at issue here) far differently from pension plans (which are not), and that difference is the starting point for understanding the extent to which the Eighth Circuit's decision below has expanded the fiduciary duties set forth in the statute. ERISA exempts welfare benefit plans, but not pension plans, from its stringent participation, accrual and vesting requirements, ERISA § 201(1), 29 U.S.C. 1051(1) (1988) (*see* 137a), and under ERISA's vesting rules, *only* accrued benefits must be nonforfeitable. ERISA § 203(a), 29 U.S.C. § 1053(a) (1988 & Supp. V 1993). (*See* 138a-142a) Thus, unlike pension plans,

ERISA does not require employers to provide welfare benefit plans. As the courts of appeals have routinely held, any rights to benefits under welfare plans are governed by the terms of the the plan documents alone, construed according to ordinary principles of contract interpretation.[9] Thus, if applicable welfare plan documents clearly reserve the right to amend or terminate a plan, employers are free to terminate benefits.

Congress chose to allow such latitude with respect to welfare benefits specifically to encourage employers to offer them. As the Report of the House of Representatives observed, the "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726; *accord Mertens, supra,* 113 S. Ct. at 2072 (noting " 'tension' " in text of ERISA between " 'primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs' ").

Accordingly, it is settled—and not even the court below disagreed (12a-13a)—that employers do not act in a fiduciary capacity when they decide to amend or terminate welfare benefits, or even when they make business decisions intended to rid employers of the costs associated with such

[9] *E.g., Bellino* v. *Schlumberger Technologies, Inc.*, 944 F.2d 26, 29 (1st Cir. 1991); *Moore* v. *Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Hamilton* v. *Air Jamaica, Ltd.*, 945 F.2d 74, 77 (3d Cir.), *cert. denied*, 112 S. Ct. 1479 (1991); *Sutton* v. *Weirton Steel Division*, 724 F.2d 406, 410-11 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *United Paperworkers International Union* v. *Champion International Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990); *Musto* v. *American General Corp.*, 861 F.2d 897, 906 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Ryan* v. *Chromalloy American Corp.*, 877 F.2d 598, 603 (7th Cir. 1989); *Howe* v. *Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990); *Alday* v. *Container Corp. of America*, 906 F.2d 660, 663 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

benefits—so long as those decisions are taken in accordance with the plan and its procedures.[10]

At the same time, there is no doubt that Congress did regulate the documentation and disclosure by fiduciaries of terms of welfare benefit plans. Congress determined that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument," ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (1988). (*See* 143a) Thus, Congress recognized that fiduciaries must protect the settled expectations of participants and beneficiaries by providing them with clear and accurate information about available benefits, *Siskind* v. *Sperry Retirement Program, Unisys*, Nos. 336, 94-7120, 1995 WL 55494, at *8 (2d Cir. Feb. 6, 1995), but that there should be no "substantial disincentives for [employers to] offer[ ]" welfare benefit plans by requiring anything more. *Moore* v. *Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *see Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (3d Cir. 1990).

[10] *E.g., Amato* v. *Western Union International, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985) (employers "assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA"), *cert. dismissed*, 474 U.S. 1113 (1986); *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990) (an "employer's decision to amend or terminate an employee benefit plan is unconstrained by the fiduciary duties that ERISA imposes on plan administrators"); *accord Sutton* v. *Weirton Steel Division*, 724 F.2d 406, 410-11 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *Izzarelli* v. *Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994); *Adams* v. *Avondale Industries, Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990); *McGath* v. *Auto-Body North Shore, Inc.*, 7 F.3d 665, 670-71 (7th Cir. 1993); *United Paperworkers International Union* v. *Jefferson Smurfit Corp.*, 961 F.2d 1384, 1386-87 (8th Cir. 1992); *Cunha* v. *Ward Foods, Inc.*, 804 F.2d 1418, 1432-33 (9th Cir. 1986); *Averhart* v. *US West Management Pension Plan*, Nos. 92-1317, 1321, 1375, 1994 WL 588622, at *7 (10th Cir. Oct 28, 1994); *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987).

In accordance with the balance struck by Congress between providing employees with access to plan information on the one hand and allowing employers the right to provide for welfare benefit plan termination or amendment on the other, ERISA sets forth in detail a fiduciary's obligations to report and disclose plan information to participants and beneficiaries. *See* ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031 (1988 & Supp. V 1993) (*e.g.*, 128a-136a); *see also Russell, supra*, 473 U.S. at 143 (statutory duties of plan administrators require "disclosure of *specified* information") (emphasis added).

The opinion of the court below is not premised on violation of any of ERISA's detailed disclosure provisions, and that court did not find that the "misleading" statements made by petitioner violated any of those provisions. Nor did the court conclude that petitioner had misrepresented the terms of the plan or that there had been any violation of the terms of the plan itself. (Indeed, it found precisely the opposite since it ruled that plaintiffs could *not* recover benefits under § 502(a)(1).)

The court did, however, ignore a critical fact that plaintiffs did not dispute: that petitioner had distributed to all plaintiffs before the formation of MCC a memorandum that stated in block capital letters that:

> "THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR [i.e., the company] TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES OF COVERED INDIVIDUALS AT ANY TIME."

(154a)[11]

[11] The district court determined that the 1984 memorandum was a summary of material modifications, *see* ERISA § 102, 29 U.S.C. § 1022 (1988) (74a-75a, ¶ 92), and that the memorandum had been distributed to all plaintiffs. (74a, ¶ 90) Although the district court concluded that the

Under these circumstances, the court's "failure to warn" theory of fiduciary liability, premised on petitioner's statements—or silence—at the time MCC was formed, added sweeping new ERISA obligations never contemplated by Congress. Nowhere do any of ERISA's disclosure provisions require plan administrators to furnish to participants information about a company's internal views—whatever those views might be—concerning the likelihood of the success of a business; nowhere do those provisions require notice of an employer's business decision to terminate a plan in the future; nowhere do those provisions require employers administering welfare benefit plans to provide *additional* disclosure of plan terms beyond the detailed requirements set forth in the statute; nowhere did the court explain how or why such nondisclosures constituted a decision concerning "plan administration".

In determining that these acts were undertaken by petitioner in its fiduciary capacity, the court below contravened this Court's admonitions in *Russell* and *Mertens* by circumventing the text of ERISA. The court simply invoked the talismanic phrase " 'duties of loyalty and prudence' " (13a) to find that petitioner was required to disclose its expectation that plaintiffs would ultimately lose benefits.[12] It did this without addressing how such a duty of disclosure could possibly exist

language set forth above was "ambiguous" (75a, ¶ 93), it did not even attempt to defend that proposition (which on its face is inaccurate); the court of appeals, in turn, failed even to mention the 1984 reservation of rights, let alone address the district court's insupportable observation about it.

[12] *Compare Young, supra*, 849 F.2d at 1045 ("[t]hough perhaps desirable in normal business conduct, Amoco owed no legal duty to reveal that it intended to create a special severance plan for the divestiture of" failing division); *Borst, supra*, 36 F.3d at 1323 n.28 (employer's "statements [misrepresenting intent not to set aside plan reserves] were not shown to be made in its fiduciary capacity, as opposed to being statements of intended action in its corporate nonfiduciary capacity"); *Lea, supra*, 903 F.2d at 631; *Blaw Knox, supra*, 998 F.2d at 1190.

where petitioner was concededly permitted—in a nonfiduciary capacity—to terminate the plan; and without finding any violation of, or even mentioning, the detailed disclosure requirements set forth in the statute. In ruling that petitioner acted as a fiduciary, the court frustrated the balance struck by Congress between the obligations of employers to comply with ERISA's disclosure provisions and the desirability of creating incentives for employers to offer welfare plans in the first place.

Review by this Court is essential to resolve the inconsistency between the ruling herein and those in *Russell* and *Mertens*, to resolve the conflict between the ruling and those of four other circuits, and to clarify the nature of the fiduciary obligations imposed by ERISA when, as ERISA contemplates and as is so often the case, a business acts in the dual capacities of employer and plan administrator.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
March 6, 1995

Respectfully submitted,

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APPENDIX[1]

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[1] Typographical errors and omissions in unpublished opinions have not been corrected.

[2] The excerpt comprises the first four pages of a multi-page document, reprinted verbatim herein.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-2056SI, 93-2111SI

Submitted: January 19, 1994

Filed: September 29, 1994

Charles Howe; Robert Wells; Ralph W. Thompson; Charlotte Chiles; Patrick Mousel, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated; John Altomare, to the extent of his claims arising from becoming disabled while working for Massey Ferguson, Inc.; Charles Barron; Alexander Charron; Anita Crowe; Ray Darr; Doris Guidicessi; Barnett Lucas; Robert Skromme; and Estate of Walter Smith, individually,

Appellees/Cross-Appellants,

—v.—

Varity Corporation and Massey Ferguson, Inc.,

Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Southern District of Iowa.

Before RICHARD S. ARNOLD, *Chief Judge*,
HANSEN, *Circuit Judge*, and STOHR*, *District Judge*.

* The Hon. Donald J. Stohr, United States District Judge for the Eastern District of Missouri, sitting by designation.

RICHARD S. ARNOLD, *Chief Judge.*

This case arises under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq. (ERISA). The plaintiffs are two classes of former employees of Massey Combines Corporation (MCC) and ten individual former employees of Massey-Ferguson, Inc. (M-F). The defendants are Varity Corporation, which controlled MCC, and M-F, Varity's wholly owned subsidiary. The District Court[1] held in favor of one class and the ten individual plaintiffs, and against the other class. We affirm, with some modification of the remedy. We hold, among other things, that individual plan beneficiaries have a right of action under ERISA, 29 U.S.C. § 1132(a)(3), for breach of fiduciary duty.

I.

We state the principal facts as found by the District Court. It is appropriate to use these findings as a predicate because the defendants do not contend that any of the findings are clearly erroneous.

M-F is a wholly owned subsidiary of Varity. It sells farm implements and related parts manufactured by other subsidiaries of Varity. On May 9, 1986, Varity formed MCC, a new entity, and transferred to MCC certain lines of business. This reorganization was given the name "Project Sunshine." MCC took over the manufacture and sale of self-propelled combines and four-wheel-drive tractors. Both of these product lines had been declining during the 1980s. The year 1986 was the all-time low for sales of self-propelled combines. Varity's purpose in forming the new concern was to put its bad eggs into one basket, so to speak. It would not have to show the large losses associated with the combines and tractors on its own financial statement, and it hoped to rid itself of substantial obligations for employee benefits due or to become due to workers in the transferred lines of business.

[1] The Hon. Donald E. O'Brien, Senior United States District Judge for the Northern and Southern Districts of Iowa.

In order to accomplish the latter objective, Varity needed to get the employees of M-F who had been engaged in selling self-propelled combines and four-wheel-drive tractors to transfer to MCC and become employees of the new corporation. M-F maintained for its employees and retired employees a number of benefits, including basic health, major medical, life insurance, vision care, hearing care, and dental benefits. These benefits were described in an "employee welfare benefit plan" within the meaning of 29 U.S.C. § 1002(1) and (3). (The term "welfare benefits" is used in contradistinction to "pension benefits." No issue regarding pension benefits is raised on this appeal. All claims concerning pension benefits have been settled.) M-F's welfare-benefit plan is still in existence, but the plaintiffs, in the view of defendants, are no longer members of it, because, as we shall shortly see, they were transferred from M-F to MCC under circumstances that have given rise to this case.

Employees who had already retired from M-F (ten of whom are individually named plaintiffs) were simply transferred to MCC. They were not asked to agree to this transfer, nor were they even aware of it at the time it occurred. M-F and Varity simply purported to substitute the new entity, MCC, as the party obligated to provide welfare benefits to employees in the transferred product lines who had previously retired from M-F. Current employees of M-F, however, were asked to consent, and did consent, to leaving M-F and signing up with MCC. In order to obtain this consent, M-F and Varity made various representations to the M-F employees in question. They told the employees, among other things, that the new company had a bright future, and that the "financial restructuring [that] created Massey Combines Corporation . . . will provide the funds necessary to ensure its future viability." *Charles Howe et al. v. Varity Corp. et al.*, No. 4-88-CV-1598, p. 21 (S.D. Iowa, Findings of Fact and Conclusions of Law filed March 26, 1993), quoting the transcript of the video shown to the M-F employees made by an officer of Varity who became president and chief executive officer of MCC.

The District Court's findings about what the employees were told continue, describing a sheet distributed by management:

> 64. The question and answer sheet ("Q & A sheet") in Exhibits A and B contained eight questions and answers. Defendants developed these questions and answers in anticipation of the "many concerns" by the employees. Defendants purposefully made the questions and answers incomplete, confusing, evasive, and deceptive. Defendants developed more forthright questions and answers, but they opted not to publish them. (Exs. 42, 46, 47.)
>
> 65. Information in Exhibits A and B concerning benefits was very limited. That information included a side-by-side comparison showing that M-F's and MCC's benefits were identical. The only question dealing with benefits was number three. The answer simply stated that "benefit programs will remain unchanged." Defendants considered telling the employees that "initially" benefits would remain the same but that MCC would be reviewing the benefits and would notify the employees of any changes. Defendants rejected this disclosure because they believed it would cause the employees to reject the acceptance forms. Soon after the employees transferred to MCC, Varity began to develop "creative and innovative ways" to reduce employee benefits. (Ex. 67.)
>
> 66. Defendants did not include in the Q & A sheet certain questions that they knew the employees wanted answered. For example, the employees wanted to know whether they were eligible for termination pay from M-F. The employees also wanted to know if they could take early retirement from M-F. Defendants purposefully did not provide answers to these and other questions because they wanted the employees to transfer to MCC in order to avoid the liabilities associated with severance pay and retirement benefits. (Ex. 47.) Defendants' failures to make these disclosures were to the detriment of the Retired and Terminated Classes.

> 67. Defendants knew they should tell the employees that they claimed the right to amend or terminate benefits in retirement. [One Varity official wrote to another] on April 15, 1986, as follows:
>
> > The following proposal results because of the govt's and lenders insisting that in communicating with employees in the formation of MCC, that we are very explicit about maintaining our rights to modify benefits in the future, i.e., that there is no promise that the present benefits will be guaranteed forever. As a result we are faced with the awkward situation that the letter may not attract those employees who we would like to join MCC.
>
> (Ex. 42.) Defendants ultimately decided to ignore the above set out proposal and not make the disclosure to the employees.
>
> 68. The representations made . . . regarding the potential financial viability of MCC, MCC's business outlook, and the employee benefits were materially misleading. Defendants knew the representations were materially misleading when they were made. Plaintiffs relied on these representations to their detriment.
>
> 69. Project Sunshine was, as mentioned above, a scheme designed, in part, to rid defendants of the obligations to pay benefits to retirees and employees of M-F.

Id. at 22-24.

In fact, when MCC was formed, it was "essentially bankrupt . . . ." *Id.* at 11. "The fair market value of the MCC common stock was zero or nominal. As of May 9, 1986, MCC had incurred on its books approximately $54 million in losses even though it had not been in operation. Inventory, receivables, and other assets that were transferred to MCC were overvalued by $46 million. . . . Similarly, MCC's liabilities, including unrecorded pension liabilities, were underestimated. In sum, MCC had a negative net worth on the day it was created (May 9, 1986), with liabilities exceeding assets by at

least $46 million. MCC started on May 9, 1986, with only $15,000 cash. It immediately drew on a line of credit and began liquidating assets to generate cash. MCC had little or no chance of survival from its onset. . . . All of MCC's officers . . . agreed that MCC's chances of survival were not good." *Id.* at 11-12.

It is no wonder, therefore, that Varity's chairman and chief executive officer bragged that he had "unloaded his losers all in one wagon" through Project Sunshine. Tr. 2652. This official also declared that "he was shifting several thousand retirees and their pension obligations into [MCC] and was delighted to be out from under all those obligations. . . . He also [said] that he got the lenders to agree to shove about $200 million worth of debt over into [MCC] off of [Varity]." *Id.* at 2652.

As expected by its principals, but not by the transferred employees, MCC failed. It went into receivership on March 4, 1988. As a result, employees of MCC stopped receiving welfare benefits. Retired employees of M-F who had been transferred without their knowledge to MCC learned for the first time of the transfer, and they also stopped receiving welfare benefits. People working for MCC at the time of its demise lost their jobs without severance pay.

II.

Three groups of employees are plaintiffs in this case. Ten named individuals had already retired from M-F at the time MCC was created. They make up the first group. The other two groups are classes of employees: the Retired Class, made up of workers who transferred from M-F to MCC and retired before MCC failed, and the Terminated Class, made up of employees who were with MCC until the end and lost their jobs when it went into receivership. The Terminated Class claims wrongful deprivation of severance or termination pay. The individual plaintiffs and the Retired Class claim wrongful deprivation of welfare benefits.

This case was tried to a jury for 17 days.[2] The plaintiffs asserted five different theories of relief: (1) breach of contract, that is, failure to pay welfare benefits in accordance with the defendants' welfare-benefit plan, see 29 U.S.C. § 1132(a)(1)(B); (2) estoppel; (3) breach of fiduciary duty in violation of 29 U.S.C. § 1104(a); (4) fraudulent misrepresentation; and (5) interference with rights protected by the statute, in violation of 29 U.S.C. § 1104. The jury returned verdicts for all three groups of plaintiffs under all five theories. It awarded the following amounts:

To the Retired Class, $7,600,000, including past-due benefits, as of the time of trial, of $696,195.

To the Terminated Class, $1,536,117, representing unpaid severance pay.

To the named individual plaintiffs, $712,332, including past-due benefits, as of the time of trial, of $82,812.

The jury also returned verdicts for punitive damages of $3 million against M-F and $33 million against Varity.

On post-trial motions filed by defendants, the District Court, in two comprehensive and painstaking opinions, set aside the jury's verdicts in part. It granted judgment as a matter of law in favor of defendants with respect to the claim of the Terminated Class. It set aside in their entirety the awards of punitive damages. As for the Retired Class, the District Court rejected as a matter of law the theories of breach of contract and fraudulent misrepresentation, the latter on the basis of preemption by ERISA. The Court upheld the jury's decision on the claims of interference with protected rights, estoppel, and breach of fiduciary duty. It then gave the win-

[2] In *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982), we held that suits under 29 U.S.C. § 1132 to recover present or future benefits under ERISA are equitable in nature, and that there is no right to trial by jury. *Accord, Kirk v. Provident Life & Acc. Ins. Co.*, 942 F.2d 504, 506 (8th Cir. 1991). No harm has been done by submitting this case to a jury, however, because the District Court has prudently made its own findings of fact. We thus have before us for review a judgment based on findings by the appropriate trier of fact.

ning plaintiffs a choice. They could either take the money awarded by the jury as compensatory damages—$7.6 million to the Retired Class and $712,332 to the individual plaintiffs —or they could elect the following alternative relief:

> Payment to the Retired Class of $696,195 in past-due benefits
>
> Payment to the individual plaintiffs of a total of $82,812 in past-due benefits
>
> Reinstatement of the Retired Class and the individual plaintiffs as members of the M-F Welfare Benefits Plan as it existed on the dates of their retirement.
>
> Retention of jurisdiction to decide details and incidents of relief, including payment of benefits accrued but not paid between the time of trial and the date of plaintiffs' reinstatement.

The plaintiffs elected to receive the sums awarded by the jury. Both sides have appealed.

III.

We first address the issues raised in the plaintiffs' cross-appeal, No. 93-2111. The principal such issue is the propriety of the District Court's rejection of the claim of the Retired Class for breach of contract. (We use the phrase "breach of contract" as a kind of short-hand here. We do not mean a common-law claim for breach of contract, arising under state law. Such a claim is, no doubt, preempted by ERISA. We refer instead to a claim under ERISA itself, 29 U.S.C. § 1132(a)(1)(B), brought by beneficiaries to recover benefits due under the Welfare Benefits Plan, to enforce their rights under the Plan, and to clarify their rights to future benefits under the Plan.)

The District Court rejected this claim on the basis of Section 7.4 of the Plan itself, which reads as follows:

> The Company hereby reserves the right, by action of the Board, to amend or terminate the Plan or Trust at any time, provided no such amendment or termination shall have the effect of diverting the Trust funds to purposes other than the exclusive benefit of the Employees except as provided in Section 7.1. However, the right to amend or terminate the Plan shall not, in any way, affect an Employee's right to claim benefits, diminish, or eliminate any claims for benefits under the provisions of the Plan to which the Employee shall have become entitled prior to the exercise of the Company's right, through its Board, to terminate or amend.

This language unambiguously confers on the company the right to amend or terminate the Plan. It is fatal to the claim of the Retired Class that, once they had retired from M-F, their right to welfare benefits became vested for life. We so held in *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990) (*Howe I*), in which we reversed the District Court's grant of a preliminary injunction in favor of the Retired Class. That holding is the law of the case.

It is true that rulings on motions for preliminary injunction are sometimes tentative, in that they may be based on an incomplete factual record, or on a preliminary assessment of the equities of the case, including the likelihood of success on the merits. But, as we remarked in *Howe I*, "an appellate court reviewing the grant or denial of a preliminary injunction may also determine whether the district court based its decision on an erroneous legal premise." *Id.* at 1109 n.3. In such a case, "[w]e . . . may reach the legal issues at the heart of the case," *ibid.*, and that is exactly what we did in *Howe I*. We squarely rejected plaintiffs' efforts to explain away Section 7.4. We also necessarily rejected plaintiffs' arguments based on a pamphlet called *You & M-F*. That pamphlet was before us on the prior appeal. These holdings were binding on the District Court on remand. We also, on this subsequent appeal, are obliged to follow them unless the law has changed, which it has not, or some clear and unmistakable miscarriage of justice will occur, which it will not. We affirm the District

Court's ruling rejecting plaintiff retirees' breach of-contract claim as a matter of law.

We also agree with the District Court's ruling as a matter of law for defendants against the Terminated Class. For many years, M-F paid severance pay to terminated employees under a policy contained in its Personnel Administration Manual (PAM). MCC continued the same policy, but when it went bankrupt, the receiver refused to pay any of the employees' severance pay. The Terminated Class contends that the PAM promises severance pay to any employees who are terminated for reasons beyond their control, which is certainly what happened to those persons who were employed by MCC at the time of its demise. However, the employees' right to severance pay is controlled by the language in the PAM. That manual expressly states:

> The publication of the practice outlining conditions for payment and the schedule of allowance *does not constitute a contractual relationship with the employee.* The termination allowance procedure represents present company practice, administered at the Company's sole discretion *which may be amended by the company without prior notice.* (Emphasis added.) (App. 613.)

PAM Section 5.01(III)(B). The employees' attempt to recover MCC severance benefits from Varity[3] has no support in the language of the PAM. The relevant provision expressly states that it "does not constitute a contractual relationship with the employee." Therefore, Varity's refusal to pay severance benefits was consistent with the plain language of the plan, and the language does not create any reasonable expectation that terminated employees would be entitled to severance pay.

We also agree with the District Court's action in setting aside the jury's awards of punitive damages against M-F ($3 million) and Varity ($33 million). Only equitable relief, as opposed to damages, is available under ERISA, see *Novak v. Andersen Corp.*, 962 F.2d 757 (8th Cir. 1992), and punitive

[3] Defendants agree, for purposes of this appeal, that Varity and M-F are alter egos of MCC. Thus, if MCC owes severance pay, Varity and M-F would be liable for it.

damages are not, by any stretch of the imagination, equitable relief. "Damages are damages, and an award of damages is a legal, not an equitable, remedy." *Id.* at 761.

On their cross-appeal, plaintiffs also challenge the District Court's rejection of their fraudulent-misrepresentation theory. The District Court held that "any claim for fraudulent misrepresentation is preempted by ERISA." *Charles Howe et al. v. Varity Corp. et al.*, Civil No. 88-1598-E, p. 27 (S.D. Iowa, Order filed March 26, 1993). We have held that a state-law claim of fraudulent misrepresentation is preempted by ERISA. *Consolidated Beef Industries, Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 964 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992). Acts of fraud may be relevant to an ERISA claim. They may even be actionable under ERISA, but if they are, it is because they violate the statute, not because they would be tortious under the common law of any state. Accordingly, the District Court was correct in rejecting a free-standing claim of fraudulent misrepresentation. Whatever fraud occurred must be analyzed in the context of the statute, and we shall do just that when we consider defendants' appeal, in the next part of this opinion.

IV.

Defendants' appeal is No. 93-2056. At the outset, they contend that *Howe I* is a complete obstacle to any form of relief in favor of plaintiffs. *Howe I*, defendants say, held that plaintiffs had no right to benefits because of Section 7.4 of the Plan. We believe defendants read *Howe I* too broadly. We did hold, as previously explained, that plaintiffs had no right to relief for breach of contract based on the documentary evidence in the record at that time, including the Plan itself and the summary description of the Plan, the pamphlet *You & M-F*. We also held that because these documents were unambiguous on their face, it was not proper to rely on extrinsic evidence.

These statements, however, must be read in context. The type of extrinsic evidence we were referring to was not that

defendants had fraudulently induced employees to transfer to MCC, but rather had to do with alleged past practices on the part of defendants, which practices, plaintiffs argued, had exempted retired employees from changes in the Plan. See 896 F.2d at 1110. Moreover, we observed that "[p]laintiffs have not argued estoppel, nor have they suggested any detrimental reliance on defendants' practices." *Ibid.* It seems clear to us, therefore, that *Howe I* cannot be read as foreclosing a theory of breach of fiduciary duty. Certainly plaintiffs are now arguing that such a breach occurred because of defendants' fraudulent misrepresentations and plaintiffs' detrimental reliance on them. We hold that *Howe I* does not bar plaintiffs from urging, on the present appeal, that they are entitled to relief on the basis of breach of fiduciary duty, estoppel, or interference with protected rights. *Cf.* 896 F.2d at 1110-11 (claim of breach of fiduciary duty with respect to benefits vesting after the 1986 transfer but before MCC went into receivership in 1988 must await "a more fully developed record and more carefully-considered factual findings than those before us.").

We turn to a discussion of the merits of plaintiffs' breach-of-fiduciary-duty claim. We have no doubt, and we do not understand defendants to dispute, that the conduct defendants engaged in, according to the findings of the District Court, was a breach of fiduciary duty in the generic sense. The statute, 29 U.S.C. § 1104(a)(1), provides, among other things, that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . ." As Judge Posner remarked with typical directness in *Peoria Union Stockyards Co. v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983): "Misrepresentations and omissions [are] breaches of . . . fiduciary obligations. Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)."

It is true that not every business decision made by a fiduciary will subject it to liability for breach of fiduciary duty, even though the decision may detrimentally affect the prosperity of the company, the assets of the plan, or the interests of plan beneficiaries. Defendants' decision to create MCC and to transfer certain assets to it, for example, was not by itself a violation of ERISA. It may have been unwise or bad business, but that is not the same thing as a breach of fiduciary duty. Plaintiffs' proof here, however, goes beyond mere business decisions on the part of defendants. "[M]isleading communications to plan participants regarding plan administration . . . will support a claim for breach of fiduciary duty." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988). "[A] fiduciary may not materially mislead those to whom the duties of loyalty and prudence described in 29 U.S.C. § 1104 are owed." *Ibid.* See also *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 600 n.11 (3d Cir.) (holding a fiduciary is under a duty to communicate material facts to a plan beneficiary), *cert. denied*, 454 U.S. 898 (1981).

Indeed, in some instances a fiduciary's duty goes beyond merely refraining from making affirmative misrepresentations. A fiduciary can also have a duty to disclose, "a duty . . . to advise [a beneficiary] of circumstances that threaten interests relevant to the relationship. For example, a fiduciary bears an affirmative duty to inform a beneficiary of the fiduciary's knowledge of prejudicial acts by an employer . . . . 'A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word.' " *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747, 750-51 (D.C. Cir. 1990) (Wald, C.J.), quoting *Globe Woolen Co. v. Utica Gas & Electric Co.*, 224 N.Y. 483, 489, 121 N.E. 378, 380 (1918) (Cardozo, J.).

Defendants, however, insist—and this is their principal argument on appeal with respect to the breach-of-fiduciary-duty claim—that there is simply no right of action for such a breach on the part of individual beneficiaries for their own benefit. Any such right of action, they argue, exists only on behalf of the Plan itself and cannot inure to the benefit of individual participants, whatever defendants may have done. In order to evaluate this argument we look first to the words

of the statute, specifically to Section 1132 of Title 29, the section that creates rights of action for violation of ERISA. Section 1132(a) reads in pertinent part as follows:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

Defendants cite *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), but this case holds only that individual plan participants have no right of action for extra-contractual compensatory or punitive damages for breach of fiduciary duty (in that case, improper or untimely processing of benefit claims). (We take the phrase "extra-contractual damages" to mean damages other than the payment of benefits owed under a plan. In *Russell* all benefits owed had been paid; additional damages for the delay in payment, including mental distress, were at stake.) *Russell* involved only Section 502(a)(2) of the statute, 29 U.S.C. § 1132(a)(2), quoted above, and plaintiff in *Russell* expressly disclaimed reliance on Section 502(a)(3), 29 U.S.C. § 1132(a)(3).

In the present case, by contrast, it is precisely paragraph (3) on which plaintiffs rely. The plain language of the statute certainly favors their position: "A civil action may be brought . . . by a participant [or] beneficiary . . . to enjoin any [violation] . . . of this subchapter or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce . . . this subchapter or the terms of the plan . . . ." Here, participants and beneficiaries seek to enjoin their exclusion from the M-F Plan, an exclusion which they claim violates the fiduciary duties imposed by Section 1104, and they also seek other appropriate equitable relief to redress past violations of the same section. But for defendants' breach of fiduciary duty, plaintiffs say, they would never have transferred to MCC, they would have been employees of M-F when they retired, and they would still be receiving benefits under the M-F Plan, which has not been terminated. We agree with the reasoning in Justice Brennan's concurring opinion in *Russell*. In his view, ERISA was intended to incorporate the law of trusts, and "it is black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits." 473 U.S. at 152-53 (Brennan, J., concurring in the judgment). Section 502(a)(3) is available to enforce these duties. It "authorizes the award of 'appropriate equitable relief' directly to a participant or beneficiary to 'redress' '*any* act or practice which violates *any* provision of this title or the terms of the plan.' . . . A beneficiary therefore may obtain 'appropriate equitable relief' whenever an administrator breaches the fiduciary duties set forth in section 404(a) [29 U.S.C. § 1104(a)]." *Id.* at 153-54 (Brennan, J., concurring in the judgment) (footnotes omitted and emphasis in original).

This Court has previously awarded individual relief to plan beneficiaries for a breach of fiduciary duty. *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984) (specifically referring to 29 U.S.C. § 1104(a)(1)(B)). As defendants point out, *Monson* does not refer to any particular paragraph of Section 502(a), 29 U.S.C. § 1132(a), and reliance on Section 502(a)(2), 29 U.S.C. § 1132(a)(2), is now foreclosed by *Russell*. But Section 502(a)(3), 29 U.S.C. § 1132(a)(3), remains available, for reasons explained above. The Seventh

Circuit has recently so held, in a case involving not affirmative misrepresentations, but simply the failure to give a plan participant full and complete material information. *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 993 (7th Cir. 1993) ("An individual may seek equitable relief from a breach of fiduciary duty under section 1132(a)(3)").

Defendants cite *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), but nothing in *Mertens* is inconsistent with the position taken here. *Mertens* simply holds that only "equitable relief" is available under Section 502(a)(3), 29 U.S.C. § 1132(a)(3), and that this phrase does not include the collection of damages from persons who are not fiduciaries but act in concert with those who are fiduciaries. Nothing in *Mertens* precludes an award of traditional equitable relief, including an injunction, restitution, and the like. As plaintiffs now concede, Brief of Plaintiffs-Appellees p. 30, after *Mertens*, compensatory damages are not recoverable under Section 1132(a)(3). But the case by no means bars equitable relief for individual participants who have suffered a breach of trust. See also *Novak v. Andersen Corp.*, 962 F.2d 757 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2928 (1993), holding that compensatory damages are not available as "equitable relief" in a suit brought by a plan participant under Section 502(a)(3).

In sum, we reject defendants' submission that individual participants or beneficiaries injured by a breach of fiduciary duty have no right of action under Section 502(a)(3) for their own benefit. In reaching this conclusion, we follow the reasoning of the Seventh Circuit in *Anweiler*, *supra*, which was decided after *Mertens*. It is also not irrelevant that a contrary holding would leave unredressed an egregious wrong. As the District Court found,

> Defendants' conduct in designing and implementing Project Sunshine was willful, wanton, malicious, and in bad faith vis-à-vis all plaintiffs.
>
> * * *

> Project Sunshine was nothing more than a brilliant manipulative effort to sever retiree welfare obligations which had become a burdensome load on a financially strapped company. Project Sunshine was a sucker punch on loyal employees who had given a lifetime of service to a company . . . . ERISA was enacted to prevent just such a maneuver as was undertaken in Project Sunshine.

Charles Howe et al. v. Varity Corp. et al., No. 4-88-CV-1598, pp. 39, 80 (S.D. Iowa, Findings of Fact and Conclusions of Law filed March 26, 1993).

We hold that the District Court was correct in granting relief to the Retired Class for breach of fiduciary duty.[4]

V.

The remaining claim, brought by individual employees who had already retired from M-F at the time of the creation of MCC, needs only brief discussion. As we have indicated, these employees were simply "transferred" to MCC without their knowledge or consent. They were given no explanation, they were not asked for permission, and they were not even informed of the "transfer" until MCC went into receivership. Such a complete disregard of the rights and interests of beneficiaries is a clear breach of fiduciary duty in violation of Section 1104(a)(1), and the named individual plaintiffs have a right of action for redress under Section 1132(a)(3). An obligor (here, M-F and Varity) cannot free itself of contractually created duties without the consent of the persons to whom it is obligated. *Restatement (2d) of Contracts*, Section 318(3), comment *d*. M-F and Varity cannot unilaterally relieve themselves of obligations to the individual retirees. Their attempt to do so is of no legal effect, and we uphold the District Court's ruling in favor of the ten named individual plaintiffs.[5]

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4 M-F and Varity do not deny that they are fiduciaries for purposes of the statute.

5 Because we are upholding the claim for breach of fiduciary duty on behalf of both the Retired Class and the individual named plaintiffs,

VI.

It remains to discuss the appropriate form of relief. In our view, under *Mertens* and *Novak*, the judgments for compensatory damages, $7.6 million to the Retired Class and $712,332 to the ten named individual plaintiffs, cannot stand. Such a judgment is legal relief, not equitable, and is not available under Section 502(a)(3). Rather, plaintiffs are entitled to receive the alternative form of relief offered to them by the District Court at the conclusion of its findings of fact and conclusions of law filed on March 26, 1993. The Retired Class should receive $696,195, an award in the nature of restitution to compensate them for benefits of which, at the time of trial, they had been deprived. The Retired Class should also receive restitution for benefits accrued between the time of trial and the entry of a final decree on remand. Finally, they are entitled to an injunction reinstating them as members of the M-F Welfare Benefits Plan under the terms of that plan as it existed at the time of retirement. Similarly, the named individual plaintiffs should receive as restitution the amounts set opposite each of their names on page 81 of the District Court's findings of fact and conclusions of law, totalling $81,812, plus an amount to compensate them for benefits accrued but not paid between the time of trial and the entry of a final decree on remand. In addition, they are entitled to an injunction reinstating them as members of the M-F Plan as of the time of their purported "transfer" to MCC.

In this way, the Retired Class and the individual plaintiffs will be restored to the position they would have occupied if the misrepresentations described in this opinion had never occurred. They will be members of the M-F Welfare Benefits Plan, which has not been terminated.

The relief awarded includes payments of money that plaintiffs would have received if they had remained members of the M-F Plan, but we do not think these payments can properly be characterized as "damages," and thus unavailable

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it is not necessary for us to discuss the alternative bases of relief, estoppel and interference with protected rights.

under Section 502(a)(3). Rather, we view the payments as restitution. Equity will treat that as done which ought to have been done. Or, to put it in words that fit the present case more precisely, equity will disregard that which ought not to have been done. Plaintiffs should never have been lured away from M-F into the financially shaky MCC. The payments we are ordering are exactly what plaintiffs would have gotten if they had remained at M-F. They are restored to their rightful position. This is restitution, and the Supreme Court in *Mertens* twice lists "restitution" as a type of equitable relief available under Section 502(a)(3). 113 S. Ct. at 2068, 2069. The statute itself mentions not only injunctions but also "other appropriate equitable relief (i) to redress . . . violations" of ERISA. Section 502(a)(3)(B). Payments of past-due benefits are analogous to awards of back pay in Title VII cases, relief uniformly regarded as equitable. *Cf. Mertens*, 113 S. Ct. at 2068 (analogizing the remedies available under ERISA to those available under Title VII.)

* * *

The judgment of the District Court is affirmed, subject to the modification of relief described in this opinion. The cause is remanded to that Court with instructions to enter a final decree not inconsistent with this opinion. Plaintiffs are awarded their costs in this Court.

HANSEN, *Circuit Judge*, concurring in part and dissenting in part.

I concur in Parts I through V of the court's opinion. I respectfully dissent from Part VI. I do so for two major reasons.

First, the remedy that our court awards the individual plaintiffs and the retired class is the very relief which the district court offered to them as an "election of remedies" and which they specifically rejected. (*See* Findings of Fact and Con-

clusions of Law of Judge O'Brien at 80 (Mar. 26, 1993) (offer); Appellees' App. at 5 (election of remedies)). Because the plaintiffs elected to take a judgment for the $7.6 million and the $712,332 monetary damage awards awarded to them respectively by the jury, it is that judgment which was appealed, and it is that judgment (and not the rejected alternative remedy) upon which the briefs and argument focused our appellate attention. In short, the correctness and validity of the alternative relief now awarded has not been tested in our appellate crucible.

Second, when the district court offered the plaintiffs the sums of money which our court now awards as being "other appropriate equitable relief" under 29 U.S.C. § 1132(a)(3) "in the nature of restitution" (*ante.* at 19), the district court very clearly determined those sums to be a "judgment for compensatory damages (actual expenses)" as to the individual plaintiffs, and to be a "judgment for compensatory damages . . . in the amount of $696,195" for the retired class. (Findings of Fact and Conclusions of Law at 81.) In his fact-findings numbered 117 and 119, the district judge characterized the same amounts as "the value of past benefits lost." (*Id.* at 41.) In *Novak v. Anderson Corp.*, 962 F.2d 757, 759 (8th Cir. 1992), we noted that funds to which a beneficiary was entitled under an ERISA plan (amounts which we then called "contractual damages") were not recoverable as an equitable remedy. Instead we deemed them recoverable as a legal remedy under a different ERISA provision. We said: "ERISA also provides a legal remedy, which allows a beneficiary to recover monetary damages for benefits owed under the plan." *Id.*

"Past benefits lost" (the district court's factual characterization) are, in my view, the same as "monetary damages for benefits owed under the plan", and under *Novak* are legal and not equitable relief. "Damages are damages, and an award of damages is a legal, not an equitable remedy." *Novak*, 962 F.2d at 761. A review of the transcript of the testimony of the individual plaintiffs reveals that more than the value of the benefits they lost under the plan has been included in the amounts the court now awards as restitution. In fact, included in the

awarded individual amounts are sums that the individual plaintiffs expended as premiums for replacement health insurance policies when their plan provided benefits ceased. I have great difficulty in seeing those sums as "restitution." To me they are traditional consequential legal damages and unrecoverable under § 1132(a)(3). Indeed, as the court points out (*ante.* at 17), the plaintiffs themselves now concede that after *Mertens v. Hewitt Assoc.*, 113 S. Ct. 2063 (1993), compensatory damages are not recoverable under § 1132(a)(3). The district court clearly called these amounts "compensatory damages." In my view our court has taken what the trial court determined were "compensatory damages" and which we said two years ago in *Novak* were a legal and not an equitable remedy, and has fashioned equitable relief by calling it all by another name, i.e., in the nature of restitution. Thus I decline to join in Part VI of the court's opinion. Instead, I would remand this case to the district court for the crafting of appropriate equitable relief.

Accordingly, I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-2056SI, 93-2111SI

Filed: December 8, 1994

Charles Howe; Robert Wells; Ralph W. Thompson; Patrick Mousel, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated; John Altomare; Charles Barron; Alexander Charron; Charlotte Chiles; Anita Crowe; Ray Darr; Doris Guidicessi; Barnett Lucas; Robert Skromme; and Estate of Walter Smith, individually,

Appellees/Cross-Appellants,

—v.—

Varity Corporation and Massey Ferguson, Inc.,

Appellants/Cross-Appellees.

On Appeal from the United States District Court for the Southern District of Iowa.

Before RICHARD S. ARNOLD, *Chief Judge*, HANSEN, *Circuit Judge*, and STOHR,* *District Judge*.

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* The Hon. Donald J. Stohr, United States District Judge for the Eastern District of Missouri, sitting by designation.

PER CURIAM.

We have before us the motion of appellants for a clarification of our opinion filed September 29, 1994.

The motion is granted, and we offer the following additional explanation and guidance for the benefit of the District Court on remand.

It was not our intention to give any reinstated persons rights that do not appertain generally to members of the MF plan as it now exists. Any entitlement that the reinstated persons have with respect to past benefits (and we include in this phrase benefits accrued since the trial) will be taken into account when restitution is made on remand and the District Court adjusts the amount of restitution as appropriate in light of intervening events. As for the future, the right to modify the plan exists to the full extent indicated by our opinion, subject of course to any applicable requirements of law and to any claim that any future modification is retaliatory with respect to, or discriminatory against, the plaintiffs in this case.

On remand, the District Court should have these remarks in mind and is free to fashion, after hearing the views of the parties and any additional evidence that it may find relevant, a more detailed decree, not inconsistent with our previously filed opinion.

In addition, appellees have requested by letter certain technical amendments to the caption. Appellants do not object. The request for amendments to the caption is granted, and the caption on this opinion has been amended accordingly.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

ORDER

Defendants' motion for judgment as a matter of law and, in the alternative, motion for a new trial as to the verdicts the Jury rendered, bring this matter before the court. This order deals with legal issues raised in the attack on the jury verdicts and is therefore separate from the Court's findings on equitable issues which are set out in a separate order filed today.[1] After careful consideration of the written and oral arguments of the parties, as well as extensive review of the transcript, trial notes, and exhaustive independent research, the court denies the motions in part and grants in part.

[1] See the Court's Findings of Fact and Conclusions of Law also filed today [48a-115a]. The court incorporates the Findings of Fact and Conclusions of Law Order herein by reference.

In this Order on post-trial motions, the court has, in summary:

1. Set aside the jury verdict on the breach of contract claim.
2. Affirmed the jury verdict on the interference with protected rights claim as in pertains to the MCC Retired Class and the individual plaintiffs, but has set aside the jury verdict on this claim that was awarded to the MCC Terminated Class.
3. Set aside the jury verdict on the fraudulent misrepresentation claim.
4. Set aside the jury verdicts for the MCC Terminated Class on all of its claims.
5. Set aside the jury award of punitive damages.
6. Given the plaintiffs a choice of what relief they prefer.

FACTS AND PROCEDURAL HISTORY

In the late 1970s, Massey-Ferguson ("M-F") began to experience financial difficulties, which continued through 1986. In 1986, Varity Corporation ("Varity"), the parent company of M-F transferred a portion of M-F's operation to a newly created Canadian corporation, Massey Combines Corporation ("MCC"). Approximately 1,500 employees were "transferred" to MCC under this transaction. MCC shortly thereafter failed, went into receivership, and terminated its employees. The original plaintiffs in this action represented retirees, disabled employees, and their survivors and eligible dependents, of M-F and MCC. Plaintiffs brought this suit to recover benefits under ERISA from M-F and its parent corporation, Varity.

This court granted a preliminary injunction in favor of the plaintiffs, conditionally recognizing the plaintiffs as a class and finding that the ERISA plan documents entitled the retirees to continued benefits throughout their lifetime. The

defendants took the case to the Eighth Circuit on interlocutory appeal and prevailed in part. The Eighth Circuit reversed this court's grant of a preliminary injunction so far as it was directed toward retirees.[2] The Circuit Court held that section 7.4 of the "master plan" contains an express reservation-of-rights clause which precludes a finding that retirees' rights to benefits vest on retirement. This court, following the release of the circuit court's opinion in *Howe I*, held a hearing on defendants' motion for summary judgment. During the consideration of the motion it became unmistakably clear to the court that the parties' interpretations of the Circuit Court's opinion were vastly different. The parties' difference of opinion concerning the meaning and application of the Eighth Circuit's order formed the basis of a continuing dispute which was a constant shadow over this case. In an attempt to obtain a clarification of the Circuit's holding in *Howe I*, this court granted a partial summary judgment on defendants' motion for summary judgment as it pertained to retirees' claims and this court entered an order allowing the parties to attempt an interlocutory appeal. The Eighth Circuit Court of Appeals denied the interlocutory appeal and said: "We feel that this issue can be reviewed by the court at the conclusion of all proceedings." *Howe v. Varity*, No. 90-8125, slip op. at 2 (8th Cir. November 14, 1990).

Upon the release of the opinion denying the interlocutory appeal, plaintiffs filed their motion for reconsideration of the grant of summary judgment. In this court's order of June 4, 1991, the granting of a partial summary judgment was reversed and the plaintiffs' application for class certification was granted. The court created two subclasses and allowed ten individual retirees to intervene. The first subclass was comprised of those persons who retired from MCC before MCC entered receivership (MCC Retired). The second subclass was comprised of those persons who were working for MCC and were terminated when MCC went into receivership (MCC Terminated).[3]

2 *See Howe v. Varity*, 896 F.2d 1107, 1110 (8th Cir. 1990).

3 The parties settled the claims of all disabled plaintiffs prior to trial.

The court after a careful review of the emerging law in the ERISA field decided to allow this matter to proceed to a jury trial on such issues that were legal in nature and to view the jury's findings on the questions that were equitable in nature as advisory. In addition, after considerable review of the emerging case law in the ERISA, area this court allowed the question of punitive damages to be submitted to the jury for their consideration.

After 17 trial days, the jury returned a verdict in favor of the plaintiffs on five theories of recovery[4] and awarded the MCC Retired Class $7,600,000 and the MCC Terminated Class $1,536,117.

The jury made the following awards to the ten individual plaintiffs:

John Altomare	$ 80,000
Charles Barron	$ 72,000
Alexander Charron	$ 48,554
Charlotte Chiles	$ 45,000
Anita Crowe	$ 49,013
Ray Darr	$ 100,000
Doris Guidicessi	$ 50,000
Barnett Lucas	$ 100,810
Robert Skromme	$ 74,955
Estate of Walter Smith	$ 92,000
Total	$ 712,332

The jury awarded $3,000,000 in punitive damages against Massey-Ferguson, Inc. and $33,000,000 in punitive damages against Varity Corporation.

4 The five grounds for recovery were; breach of contract, promissory estoppel, breach of fiduciary duty, fraudulent misrepresentation, interference with protected rights.

DISCUSSION[5]

LAW OF THE CASE

This case as noted above, went up to the Eighth Circuit Court of Appeals on an interlocutory appeal of this court's injunction prohibiting defendants from denying welfare benefits to the plaintiff class. This court issued its injunction order following limited discovery by the parties. The order granting injunctive relief was based solely on plaintiffs' breach of contract theory as it pertained to those persons in the class who had retired from either M-F or MCC, and those persons who were disabled.

As mentioned, following the Circuit Courts opinion in *Howe I*, an intense debate arose between the parties as to precisely what the Circuit Court had said. Defendants' position was that this case was over, that the Circuit Court had decided the merits and had foreclosed all possible grounds for recovery, and that it was error for this court to ignore the "law of the case." Defendants base their argument on the premise that the Circuit Court found that section 7.4 of the master plan (reservation of rights to terminate and amend), together with the past practice of the company clearly precludes a finding that retirees' rights to benefits vest for life on retirement and that therefore there are no issues left and the case is over because plaintiffs can not recover any benefits when the company never promised them for life.

Plaintiffs counter this argument by contending that the defendants' reading of *Howe I* reaches much further than the Circuit Court intended. Plaintiffs argue that because of the limited record before the Circuit Court on the injunction appeal the Circuit Court did not have enough before it to foreclose plaintiffs' theories of estoppel and fraud. Further, plaintiffs argue that the Circuit Court could not and did not address the issue of whether section 7.4 was disclosed adequately to the plaintiffs.

5 This order as well as this court's Findings of Fact and Conclusions of Law order, filed in conjunction with this order of necessity have some overlap. The court has made findings of fact which are directly transferable to this order. The court, in these orders has responded to all issues raised in the parties post-trial motions. These pleadings cover some 562 pages of the court's file. In addition the court has reviewed the over 7,000 pages of trial and post-trial transcripts.

This court, after careful review of the Circuit Court's opinion and the parties' arguments, was also unable to ascertain precisely what the Circuit Court's holding in *Howe I* meant. As mentioned, in an effort to seek clarification of that order, this court granted defendants' motion for summary judgment as it pertained to retirees and certified the order allowing for an interlocutory appeal. That appeal was not accepted by the Circuit. Thereupon, this court rejected defendants "law of the case" argument that all the issues had been decided and embarked on a path which would allow both parties an opportunity to develop all the record they felt appropriate for appellate review. *See generally Builders Steel Co. v. Commissioner of Internal Rev.* 179 F.2d 377 (8th Cir. 1950).

In reaching this decision the court carefully reviewed *Continental Bank & Trust Co. v. American Bonding*, 630 F.2d 606, 608 (8th Cir. 1980) wherein the court stated:

> It is beyond cavil that the decision on former appeal is the "law of the case" on a question presented in that former appeal, unless the evidence introduced at the subsequent trial is substantially different from that considered on the first appeal, and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless that decision is clearly erroneous and works manifest injustice. * * *
>
> While this rule of practice is not a limit of power, it is nevertheless a salutary one, and should be departed from only after careful consideration on situations arising on specific cases. (citations omitted).

Further, this court reviewed the following passages from *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 697-98 (8th Cir. 1948):

> We recognize the established rule that, under an appeal from a decree for a preliminary injunction, the

appellate court ought not to determine crucial questions conditioning the merits of the case; (1) Because their adjudication of such questions ought not to be made until after the parties have had an opportunity to present their evidence and their arguments upon the entire proof; (2) because such an adjudication would not estop any of the parties in the subsequent trial of the issues of the case or otherwise; and (3) because such a decision would in many cases be made on a different state of facts and upon different arguments from those presented at the final hearing, and we neither decide nor intimate our opinion upon those questions.

* * *

The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for.

(citations omitted)

Accordingly, this court, ever mindful of *Howe I*, choose the course of trial and resolution of this matter, a choice which provided all parties their day in court. All arguments in relation to the law of the case are denied.

RIGHT TO JURY A TRIAL

This court, in its order of August 6, 1991, denied defendants' motion to strike plaintiffs' jury demand. This court proceeded to a jury trial on this matter wherein all issues were presented to a jury. As in other aspects of this trial, this decision sparked great debate between the parties. This court informed all counsel that it would submit this matter to the jury and treat all claims that were legal in nature as binding and those issues equitable in nature as advisory pursuant to F.R.Civ.P. 39(c). In accordance with this ruling the court today in a separate order also files it Findings of Fact and Conclusions of Law which includes the possibility of permanent injunctive relief if that is the choice of the plaintiffs.

The court has considered carefully the defendants' arguments opposing a jury trial and denies all motions based thereon. The court, in support of this ruling incorporates its previous order on this issue dated August 6, 1991.[6] Therefore, the court denies defendants' motion for a new trial based on this matter having been presented to a jury.

ALTER EGO

The court discusses all arguments in relation to the issue of alter ego in its order on Findings of Fact and Conclusions of Law pages 41-50 [80a-89a]. As noted in that order, all of defendants' motions in relation to the alter ego issue are denied.

JUDGMENT AS A MATTER OF LAW

Federal Rule of Civil Procedure 50 was amended on December 1, 1991, to change the name of a motion which previously had been called in part judgment notwithstanding the verdict to judgment as a matter of law. Rule 50(b) states:

> **Renewal of Motion for Judgment After Trial; Alternative for New Trial.** Whenever a motion for a judgment as a matter of law made at the close of all evidence

6 The court, since its order of August 6, 1991, has become aware of the following cases supporting this court's position that the Seventh Amendment guaranties the right to a jury trial in ERISA cases: *International Union v. Midland Steel Prod.*, 771 F.Supp 860 (N.D. Ohio 1991); *McDonald v. Artcraft Elec. Supply Co.*, 774 F.Supp. 29 (D.D.C. 1991); *Steeples v. Time Ins. Co.*, 139 F.R.D. 688 (N.D. OK 1991); *Weber v. Jacobs MFG.Co.*, 751 F. Supp. 21 (D. Conn. 1990); *Resnick v. Resnick*, 763 F. Supp 760 (S.D.N.Y. 1991). In addition the following article is noted *The Right to Jury Trial in ERISA Civil Enforcement Actions*, 15 Am.J.Trial Advoc. 157 (1991).

The court is aware of the authority to the contrary, specifically *Kirk v. Provident Life & Accident Ins. Co.*, 942 F.2d 504, 506 (8th Cir. 1991); *In Re Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Bright v. Federated Mutual Ins. Co.*, No. 92-10499 (Nov. 10, 1992, S.D. Iowa) (Longstaff, J., noting this court's August 6, 1991 order, but following *Kirk* because claim involved was equitable in nature). As set out in the August 6, 1991 order, this court believes that *Vorpahl* and *Kirk* are limited to cases involving solely equitable or declaratory relief in light of the ruling in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

> is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. * * * A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

The court will now address those claims of the plaintiffs which are not equitable in nature and which were submitted to the jury for their determination.

BREACH OF CONTRACT—COUNT 1

M-F-RETIRED INDIVIDUAL PLAINTIFFS

MCC-RETIRED CLASS

The defendants argue that this count was dismissed in *Howe v. Varity*, 896 F.2d 1107 (8th Cir. 1990) ("*Howe I*"), which stated that "welfare benefit plans may be modified or terminated absent the employer's contractual agreement to the contrary." *Howe I*, 896 F.2d at 1109; *see also Anderson v. Alpha Portland Indus. Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987). The defendants argue further that Congress has explicitly exempted welfare benefits from ERISA's vesting provisions. *Massachusetts v. Morash*, 490 U.S. 107, 109 S.Ct. 1668, 1675 (1989). Finally, they argue that the Eighth Circuit has held explicitly that benefits under an employee welfare benefit plan, unlike pension benefits, do not vest under ERISA and that "nothing in the terms of ERISA prevents the employer from changing an employee welfare benefit plan." *John Morrell*, 830 F.2d at 875-876 (citing *In re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986) ("we discern no basis for finding mandatory vesting in ERISA of retiree welfare benefits")).

The issue then is "simply one of contract interpretation." *Howe I*, 896 F.2d at 1109 (quoting *Alpha Portland*, 836 F.2d

at 1516). The defendants state that the "plaintiffs have the burden of proving vested welfare benefits," *Howe I*, 896 F.2d at 1107; *Alpha Portland*, 836 F.2d at 1517, whereby proving that the employer contractually agreed not to modify or terminate benefits. The proof of promise cannot be inferred, rather it must be an affirmative promise by the employer. *Alpha Portland*, 836 F.2d at 1517.

The defendants contend that all the plan documents were considered by the Circuit Court in *Howe I*, not just section 7.4 as argued by the plaintiffs. The defendants further argue that the Circuit Court then concluded as a matter of law, plaintiffs are not entitled to lifetime welfare benefits and found "[n]othing in the documents that establishes retirement as a vesting point." *Howe I*, 896 F.2d at 1110. The defendants also point out that the Circuit Court states that "section 7.4 of the plan does not itself pinpoint retirement as a vesting trigger." *Id.* at 1110.

The defendants claim that since plaintiffs cannot point to any language in the plan that promises benefits will "vest" at retirement, or that benefits would not be modified or terminated or that the benefits would be irrevocable, or that they would be "for life," the breach of contract claim should be dismissed. Defendants further argue that the MCC Retiree plan documents (which is the M-F plan) explicitly, unambiguously and clearly reserve a right to amend or terminate welfare benefits under section 7.4 of the Master Plan, which specifically provides that:

> The company hereby reserves the right, by action of the Board, to amend or terminate the Plan or Trust at any time, provided no such amendment or termination shall have the effect of diverting the Trust funds to purposes other than the exclusive benefit of the Employees except as provided in Section 7.1. However, the right to amend or terminate the Plan shall not, in any way, affect an Employee's right to claim benefits, diminish, or eliminate any claims for benefits under the provisions of the Plan to which the Employees shall have become entitled prior to the exercise of the Company's right, through its Board, to terminate or amend.

In addition, defendants argue that Section 8.1 of the Master Plan gives the Board of Directors of the Company, or the Executive Committee of the Board of Directors the power to amend or terminate the plan. Further, Appendix B to the Master Plan provided for medical, accident or other benefits, but these benefits, according to Section 7 of the Plan may be amended or terminated. Additionally, Appendix B(1) provided that welfare benefits for the employees (both active employees and retirees would cease automatically, upon termination of the Plan.

The defendants further contend that the Court of Appeals has held in *Howe I* that provisions that appeared in M-F Inc.'s benefit plan documents reserving the right to terminate or amend benefits override any promises of "lifetime" benefits. Defendants claim that the Circuit Court examined section 7.4 of the Master Plan and concluded that M-F Inc. had reserved the right to terminate or amend benefits and therefore any claim for breach of contract must fail.

Plaintiffs do not argue that ERISA includes a mandatory vesting requirement for welfare benefits, but they claim that parties may contract for vesting of welfare benefits. *John Morrell*, 830 F.2d at 876-877; *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499, 1505 (11th Cir. 1988); *In re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986); *DeGeare v. Alpha Portland Industries, Inc.*, 837 F.2d 812, 815 (8th Cir. 1988); *Jansen v. Greyhound Corp.*, 692 F.Supp. 1029, 1036 (N.D. Iowa 1987). Thus, when an employer promises to provide health benefits to its employees without advising them of grounds for termination of the plans, the employer has a contractual obligation under ERISA to provide the benefits. *Jansen*, 692 F.2d at 1037; *Connors Steel*, 855 F.2d at 1505; *White Farm*, 788 F.2d at 1191. These decisions, plaintiffs argue, rely on the fact that federal common law was created to govern obligations an employer owes its employees. *Franchise Tax Board v. Construction Laborers Vaction Trust*, 463 U.S. 1, 24, n.6 (1983). In this case, ordinary contract principles should be used to determine if benefits are vested. *DeGeare*, 837 F.2d at 815.

Plaintiffs finally argue that the defendants are equitably estopped from relying on section 7.4 to deny welfare benefits because they failed to include a termination provision in the summary plan description (SPD). Under ERISA, an employer must provide a summary plan description to participants which describes circumstances which may result in disqualification, ineligibility, or denial or loss of benefits, written in understandable form, which is sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations under the plan. *Arnold v. Arrow Transp. Co. of Delaware*, 926 F.2d 782, 785 (9th Cir. 1990). Employees are entitled to rely on descriptions contained in summary benefits plan descriptions required by ERISA. Poor drafting of summary benefit plan descriptions may extend or enlarge coverage which would otherwise be unavailable. *Branch v. G. Bernd Co.*, 764 F. Supp. 1527, 1538 (M.D. Ga. 1991).

When determining the duration of the plaintiffs' benefits, the court must begin by examining the language of the plan documents. *Id.* at 816; *Alpha Portland*, 836 F.2d at 1516. Each provision of the plan documents should be read consistently with all other provisions and as part of integrated whole. *DeGeare*, 836 F.2d at 816. If ambiguities exist, extrinsic evidence may be considered.

The court finds that defendants' motion for judgment as a matter of law on the breach of contract count should be granted. For plaintiffs to recover under this count they must show a contract for lifetime benefits which can not be terminated. They cannot make such a showing in the face of section 7.4. Plaintiffs' arguments relating to estoppel and failure to disclose adequately the reservation of rights provisions of the plan are best directed to other counts that are discussed in the court's Findings of Fact and Conclusions of Law order.[7]

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[7] The court realizes that traditionally equitable estoppel is a defense, however given the emerging case law and the posture of this case the court concludes that it is appropriate to recognize equitable estoppel as an independent cause of action. *See Fitch v. Arkansas Blue Cross and Blue Shield*, 795 F.Supp. 904, 906-07 (W.D. Ark. 1992); *Kane v. Aetna Life Insurance*, 893 F.2d 1283, 1285-86 (11th Cir. 1990), *cert denied*, ___ U.S. ___, 111 S.Ct. 675, 112 L.Ed.2d. 668 (1991).

Accordingly, defendants' motions for judgment as a matter of law on count 1 (breach of contract) is granted as it relates to claims made by the MCC-Retired Class and the Individual Plaintiffs. The claims of the MCC-Terminated Class will be discussed below.

MCC-TERMINATED Class

Defendants argue that the claims of the MCC Terminated Class must fail for the same reasons that the retirees claims failed, i.e., the lack of a contract on which an action for breach could be based. Defendants further argue that not only do plaintiffs confront a termination allowance policy which does not affirmatively promise vested termination benefits, but the policy expressly stated that it contained no contractual promise to provide termination allowances to employees. In support of their position defendants cite trial exhibit 7, which is PAM 5.01.01 (III)(B)[8] which states:

> The publication of the practice outlining conditions for payment and the schedule of allowances does not constitute a contractual relationship with the employee. The termination allowance procedure represents present Company practice, administered at the Company's sole discretion which may be amended by the Company without prior notice.

Defendants further argue that this class of plaintiffs were not even eligible for consideration for termination allowances. Defendants state that only an employee whose separation was classified as a "Termination-Release" was eligible for a termination allowance. PAM 5.01.01(III)(C). "Termination Release" is defined as situations where:

1. employee is putting forth his best effort, but cannot perform at an acceptable level in his present position;

8 PAM is an acronym for Personnel Administration Manual.

2. employee not designated for layoff who refuses an offer of work which is considered unsuitable according to Section IV.A.4 of this procedure;
3. employee is habitually tardy or absent because of factors beyond his control;
4. employee is no longer performing at an acceptable level as a result of significant change in position requirements;
5. employee is separated as the result of the sale of a company-operated retail store and not reemployed by the successor store within thirty (30) days following the date of its transfer to the purchaser; or
6. other individual reasons consistent with this P.A.M. as approved by the Director of Personnel—Head Office.

PAM 3.05.01(V)(D), Ex. 6.

Plaintiffs, in support of their claim, argue that according to past company practice their claim would lie under item number 6 (above) "other individual reasons consistent with this P.A.M. as approved by the Director of Personnel—Head Office."

The court finds that the defendants clearly stated in trial exhibit 7, PAM 5.01.01 (III)(B), set out above on pages 14-15 of this order, that they are not creating a contractual relationship as to these benefits. Further, under the terms of the P.A.M. defendants reserved the right to administer the plan in their sole discretion and amend without prior notice. Therefore, the refusal to pay termination benefits to this subclass cannot form the grounds for a breach of contract claim. Accordingly, defendants motion for judgment as a matter of law as it relates to the MCC - Terminated Class is granted on the breach of contract claim (count 1).

BREACH OF FIDUCIARY DUTY—COUNT 2

The court's discussion on Count 2 can be found in the Court's order on Findings of Fact and Conclusions of law pages 50-63 [89a-97a]. As noted in that order, defendants'

motions in relation to breach of fiduciary duty are granted as against the MCC Terminated Class and denied as to the MCC Retired Class and the individual plaintiffs.

INTERFERENCE WITH PROTECTED RIGHTS—COUNT 3

M-F-RETIRED INDIVIDUAL PLAINTIFFS

MCC-RETIRED CLASS

ERISA § 510, 29 U.S.C. § 1140, makes it unlawful "for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit plan]." Participants and beneficiaries may sue for violations of this statute under 29 U.S.C. § 1132(a)(3).

Plaintiffs argue in support of their claim under § 1140 that the evidence supports the jury's finding that defendants compelling motive for creating MCC and transferring plaintiffs to MCC was to rid themselves of an enormous debt, including the cost of benefits plaintiffs would have received at retirement or termination. Plaintiffs also allege that defendants accomplished this task by *ensuring* that all the Combines and Related Equipment ("CARE") Division employees would transfer to MCC by assuring them that their benefits would be unchanged. As a result, plaintiffs claim that defendants interfered with their protected rights by coercing them to transfer to MCC by making statements that later proved to be false.

Defendants argue in support of their motion to defeat this claim that because the Eighth Circuit ruled in *Howe I* that plaintiffs' right to benefits had not vested, the "protected rights" could not have been "interfered" with. *See Phillips v. Amoco Oil Co.*, 614 F.Supp. 694, 723 (N.D. Ala. 1985), *aff'd.*, 799 F.2d 1464, 1471 (11th Cir. 1986). Defendants also believe that the transfer of the combines division and its employees to MCC does not implicate 29 U.S.C. § 1140 because section 1140 was not intended to prohibit the sale of businesses. *Phillips*, 614 F.Supp. at 721-724.

In response, plaintiffs argue that the Eighth Circuit's ruling in *Howe I* did not determine whether defendants interfered with plaintiffs' protected rights. They claim that the statute (section 1140) explicitly states that it is "unlawful" for any person to interfere with "the attainment of any right" under the plan. *Vogel v. Independence Federal Savings Bank*, 692 F.Supp. 587, 593 (D. Md. 1988).

To establish a claim for interference with protected rights, plaintiffs must prove:

a. Prohibited conduct;

b. Taken for the purpose of interfering;

c. With the attainment of any right to which the plaintiffs may have become entitled under the plan.

See Adams v. LTV Steel Mining Co., 936 F.2d 368, 370 (8th Cir. 1991); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3rd Cir.), *cert. denied*, 484 U.S. 979 (1987). Conduct made actionable by this statute is any adverse employment action taken for the prohibited purpose, and includes any scheme to prevent employees from attaining eligibility for benefits protected by ERISA. *See Gavalik*, 812 F.2d at 854-57 ("liability avoidance scheme"). Plaintiffs must prove the defendant's specific intent to engage in proscribed activity, but the desire to avoid ERISA obligations need not be proven to be the sole motivating factor in the defendants' conduct. *Id.* at 851-52.

An employer may be held liable for a violation of § 1140. ERISA defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." 29 U.S.C. § 1002(5). This court has determined that defendants were plaintiffs' employer either directly or alter egos of MCC when the alleged violations of § 1140 occurred.[9] Implementation of a scheme of employment transfers, terminations or layoffs that is motivated by the desire to prevent employees from attaining rights under an employee benefit plan is conduct

[9] See this court's order on Findings of Fact and Conclusions of Law pages 41-50 [80a-89a].

actionable under this section. *See Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd Cir.), *cert. denied*, 484 U.S. 979 (1987). Using misinformation to entice a participant or beneficiary to take actions affecting his employment status and corresponding benefit entitlements is conduct actionable under this section. *See Greenblatt v. Budd Co.*, 666 F. Supp. 735, 740 (E.D. Pa. 1987) (harassment intended to force employee to retire is actionable under § 1140). Remedies available for violation of 29 U.S.C. § 1140 include payment for lost benefits and any other equitable relief necessary to make the plaintiff whole. *See, e.g., Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1015-20 (W.D. Mo. 1984); and *Bittner v. Sadoff & Rudoy Industries*, 490 F. Supp. 534, 536 (E.D. Wis. 1980).

Applying these standards to the case at bar, the court concludes that Project Sunshine was a scheme designed, in part, to prevent employees of M-F from attaining rights to which they would have become entitled if they had retired under the M-F Plan.[10] Defendants violated § 1140 with respect to the MCC-Retired Class when, in order to persuade them to transfer to MCC, defendants deliberately misinformed them or knowingly failed to inform them about several aspects of the proposed transfer, to-wit:

(1) MCC's prospects of viability.

(2) Benefits would not change.

(3) Right to take early retirement from M-F before being transferred to MCC.

(4) Right to severance pay from M-F in the event they refused the transfer to MCC.

(5) The effect a receivership of MCC would have on their benefits.

One of the facts motivating defendants to misinform or fail to inform the members of the Retired subclass was defendants'

[10] This court discusses fully all aspects of M-F and Varity debt reduction plan, Project Sunshine, in this court's order on Findings of Fact and Conclusions of Law at pages 7-14 [53a-58a] and pages 41-50 [80a-89a].

desire to avoid liability for health and welfare benefits to those plaintiff class members under the M-F Plan.

The court concludes that defendants' conduct toward plaintiffs constituted discrimination prohibited by 29 U.S.C. § 1140. The MCC-Retired Class is therefore entitled to recover compensatory damages for past unpaid benefits, and to compensatory damages for future benefits or to injunctive relief in placing them back on the M-F plan under 29 U.S.C. § 1132(a)(3), however they may so elect. Accordingly, defendants' motions in relation to these plaintiffs are denied.

MCC-TERMINATED CLASS

Plaintiffs' claims for relief as to this subclass mirror those of the MCC-Retired and Individual Plaintiffs' claims listed and discussed above. In turn, defendants' motion for judgment as a matter of law also mirrors their arguments above.

Under the mandate of *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 113-15 (1989), this court finds that because of the defendants' reservation of the right to interpret this plan, the standard of review here is not de novo but an arbitrary and capricious standard. When viewed as a whole, M-F's termination—severance pay plan did not create any reasonable expectations in the MCC-Terminated Class.

This finding is supported in light of sections 3.05 and 5.01 of the Personnel Administration Manual ("PAM") Exs. 6, 7) constitute employee welfare benefit plan documents within the meaning of ERISA which governed the provision, level, extent and duration of severance benefits. Section 3.05 of the PAM describes six situations as set out in full on pages 16-17 [36a-37a] above. Persons included under the types of situations set out in 3.05 of the P.A.M. are eligible for termination allowance.

Section 5.01 of the PAM provides:

III. *GENERAL*

A. It is the practice of the Company to provide a measure of income protection for full-time salaried employees in the event of their separation for reasons beyond their control.

1. This practice does not apply to salaried employees—

a. with less than three months' continuous service;

b. hired as Limited Service Employees (casual—temporary); or

c. hired under the Cooperative Education Student Program.

B. The publication of the practice outlining conditions for payment and the schedule of allowances does not constitute a contractual relationship with the employee. The termination allowance procedure represents present Company practice, administered at the Company's sole discretion which may be amended by the Company without prior notice.

C. Eligibility for termination allowance is based upon the separation classification as outlined in P.A.M. 3.05.01, Separations—Salaried Employees.

1. An employee will not be eligible for termination allowance if the separation is classified as any of the following:

a. "Quit"
b. "Discharge"
c. "Layoff"
d. "Retirement, Death or Disability"
e. "Termination—Unsatisfactory"
f. "Assignment Completed"

2. An employee whose separation is classified as "Termination—Release" will be eligible for termination allowance.

G. *Approval Procedure*

1. The manager of the terminated employee will initiate termination action in accordance with PAM 3.05.01,

Separations—Salaried Employees. Recommendations regarding termination allowance will be noted in a separate memo. The initiating manager will make only recommendations; he or she will not calculate the actual amount of termination allowance. No commitment is to be made to the employee until notice has been received that the allowance has been authorized.

2. Upon receipt of the Employee Profile and accompanying memo, Personnel Administration Department will review the recommendations and details regarding the termination. Any termination allowance must be approved by Personnel Administration Department. Recommendations are to be based only on the reasons outlined on the Employee Profile. Therefore, it is important that concise and accurate explanations be given to the employee and be provided on the Employee Profile (Form MF-4197).

The plan language above clearly states that "an employee will not be eligible for termination allowance if the separation is classified as any of the following: quit, discharge, layoff, retirement, death or disability, termination - unsatisfactory, assignment completed". The evidence is clear, without the transfer to MCC, employment conditions at M-F for this subclass were going to change because the entire combine industry was in dire straits. Under the factors listed above, this subclass of plaintiffs (MCC-Terminated consisting of @ 140 persons) are unable to state a successful claim for interference with any protected right. The motions of the defendants are sustained as to this subclass.

ESTOPPEL—COUNT 4

The court's discussion on Count 4 can be found in the Court's order on Findings of Fact and Conclusions of law pages 63-78 [100a-112a], wherein the court found that the M-F Retired Individual Plaintiffs and MCC Retired Class were entitled to relief and the MCC Terminated Class were not entitled to relief on the estoppel claim.

FRAUDULENT MISREPRESENTATION—COUNT 5

M-F-RETIRED INDIVIDUAL PLAINTIFFS

MCC-RETIRED CLASS

MCC-TERMINATED CLASS

Plaintiffs argue, under this claim, that the evidence shows that defendants made numerous material misrepresentations and omissions in inducing plaintiffs to transfer to MCC. As noted previously, defendants: (a) assured plaintiffs that their benefits would be unchanged if they accepted employment with MCC; (b) failed to disclose MCC's unstable financial condition and poor prospects for survival; (c) failed to disclose the effects of MCC's probable bankruptcy, insolvency or receivership would have on the welfare benefits of MCC employees; and (d) failed to inform employees as required by ERISA in the benefits booklet given to them entitled *You and M-F*, that the company reserved the right to amend or terminate the welfare benefit plan. The evidence at trial further demonstrated that when defendants made the material misrepresentation and omissions, their primary purpose was to induce the plaintiffs into accepting the transfer to MCC.

Defendants again allege that, in *Howe I*, the Eighth Circuit reviewed the documents and found no representation promising plaintiffs lifetime welfare benefits. Defendants also claim that the Eighth Circuit held that defendants made no promises not to amend or terminate the plan and therefore there is no basis for plaintiffs' fraudulent misrepresentation claim. Defendants further argue that any claim for fraudulent misrepresentation is not cognizable under ERISA. After extensive research the court agrees with defendants that any claim for fraudulent misrepresentation is preempted by ERISA. *See Consolidated Beef Indus., Inc. New York Life Ins. Co.*, 949 F.2d 960,964 (8th Cir. 1991); *Farlow v. Union Central Life Ins. Co.*, 874 F.2d 791, 793-94 (11th Cir. 1989); *Paul Revere Life Insurance Co. v. Vandenplas*, Civ. Nos. 3-91-547, 721, 1992 WL 320994 at p.4 (D.MN Oct. 27, 1992).

Although the cases cited above are not factually "on all fours" with the situation presented here, the following case is

fairly close. In concluding that claims based on fraud were preempted, the Fifth Circuit, in *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1218 (5th Cir. 1992), stated:

> This conclusion is buttressed by decisions of this and other courts addressing claims of fraudulently induced retirement and wrongful termination, which are the crux of appellants' state law claims here. In the closely analogous case of *Lee v. E.I. Du-Pont de Nemours and Co.*, 894 F.2d 755 (5th Cir. 1990), the plaintiffs alleged that they had retired in reliance on their employer's representations that the company was not preparing to adopt an early retirement incentive plan, and they sued their former employer for fraud and negligent misrepresentation in that respect. We held that the claims were preempted under section 514(a).

The weight of authority is against the plaintiffs. Accordingly, any claim for relief under this theory must fail, and defendants' motion for judgment as a matter of law is granted on count 5, fraudulent misrepresentation.

PUNITIVE DAMAGES

The court discusses plaintiffs' claim for punitive damages in its order on Findings of Fact and Conclusions of Law pages 78-79 [113a], wherein the court found punitive damages were not appropriate in light of *Novak v. Anderson Corp.*, 962 F.2d 757 (8th Cir. 1992).

MOTION FOR NEW TRIAL.

Federal Rule of Civil Procedure 59, in pertinent part provides that:

> A new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

This court, in reviewing a motion for new trial, is not required to view the evidence in the light most favorable to the nonmovant; rather, it may weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict. *Quachita National Bank v. Posco Corp.*, 686 F.2d 1291 (8th Cir. 1982). The authority to grant a new trial is confided almost entirely to the exercise of discretion on the part of the trial court. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S.Ct. 188, 191, 66 L.Ed.2d 193 (1980). A motion for new trial should be granted when the moving party has met his burden of showing either that prejudicial error has been committed or substantial justice has not been achieved. *Mid Continent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359 (8th Cir. 1973).

All other points and issues raised by defendants in their motions and in their 171 page brief in support thereof, not mentioned herein or in this court's Findings of Fact and Conclusions of Law order, have been considered and are hereby denied. Defendants' shotgun approach to these motions does not obligate this court to respond to each and every point raised. The court has, however, reviewed each and every point raised by defendants and finds those not discussed above or in this court's order on Findings of Fact and Conclusions of Law are hereby denied.

THEREFORE IT IS HEREBY ORDERED that defendants' motion for judgment as a matter of law setting aside plaintiffs' breach of contract jury verdict (count 1) is granted as against all plaintiffs.

IT IS FURTHER ORDERED that defendants' motion for judgment as a matter of law on plaintiffs' interference with protected rights claims (count 3) is denied as to the claims of the MCC-Retired Class and the Individual Plaintiffs. Defendants' motion on said claim is granted as to the claims of the MCC-Terminated Class.

IT IS FURTHER ORDERED that defendants' motion for judgment as a matter of law setting aside plaintiffs' fraudulent

misrepresentation jury verdict (count 5) claim is granted against all plaintiffs.

IT IS FURTHER ORDERED that motion for judgment as a matter of law as to punitive damages is granted and the jury's award of punitive damages is set aside.

IT IS FURTHER ORDERED that plaintiffs' shall make an election on damages within 20 days of the date of this order. Plaintiffs' can either accept the relief granted in this court's Order on Findings of Fact and Conclusion of Law which includes injunctive relief and actual damages or accept the jury's award on the claims listed above with the relief granted, as set out below:

1. MCC Retired Class $7,600,000 for damages past and future.

2. The ten individual plaintiffs for damages past and future:

John Altomare	$ 80,000
Charles Barron	$ 72,000
Alexander Charron	$ 48,554
Charlotte Chiles	$ 45,000
Anita Crowe	$ 49,013
Ray Darr	$ 100,000
Doris Guidicessi	$ 50,000
Barnett Lucas	$ 100,810
Robert Skromme	$ 74,955
Estate of Walter Smith	$ 92,000
Total	$ 712,332

March 26, 1993

/s/ DONALD E. O'BRIEN
DONALD E. O'BRIEN, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 4-88-CV-1598

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON INC.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs sued to recover benefits pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 § 1001, *et seq.*, as well as several related federal common law doctrines. Jurisdiction in this court is founded on 29 U.S.C. § 1132(e) and 28 U.S.C. § 1331.

This court has on this date entered another order in relation to the post trial motions pertaining to the jury verdicts. This order covers all issues, both those decided by the jury and those decided by the court, to establish a better record in the

event the Circuit Court finds that submission to a jury was inappropriate.

In this Order, the court has, in summary:

1. Ruled that the MCC Retired Class and the individual plaintiffs should prevail on their claims of equitable estoppel and breach of fiduciary duty and that the jury verdicts on these claims shall stand as relates to them.
2. Ruled that these plaintiffs shall make an election of remedies.
3. Set aside the jury verdicts for the MCC Terminated Class on all of its claims.

BACKGROUND and PROCEDURAL HISTORY

There are ten individual plaintiffs. The court ruled on June 4, 1991, that these individuals could not proceed as a class action. These plaintiffs will hereinafter be referred to as the "Individual Plaintiffs."

Also on June 4, 1991, the court ordered, pursuant to Fed. R. Civ. P. 23(c)(4), that two subclasses of plaintiffs be created and proceed as class actions. The first class consists of eighty-three plaintiffs who worked for Massey-Ferguson, Inc. ("M-F") before May 9, 1986. These plaintiffs were thereafter "transferred" to Massey Combines Corporation ("MCC") and retired before March 4, 1988, when MCC went into receivership (bankruptcy) in Canada. This class shall hereinafter be referred to as the "MCC-Retired Class." The second class is comprised of one hundred forty plaintiffs who worked for M-F before May 9, 1986. These plaintiffs were also thereafter "transferred" to MCC. They were still employed on March 4, 1988. This class shall hereinafter be referred to as the "MCC-Terminated Class."

Defendants are M-F and Varity Corporation ("Varity"), which formerly was known as Massey-Ferguson Ltd.

The court entered a preliminary injunction on July 14, 1989. That injunction was modified by the Eighth Circuit Court of Appeals in *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990). (*Howe I*) The case returned for further proceedings, which included the addition of new parties, substantial discovery, significant pleading amendments, numerous pretrial motions, and unsuccessful attempted appeals by plaintiffs and defendants.

The case was tried before this court to a jury from August 26 until September 20, 1991. Defendants have throughout this proceeding maintained plaintiffs do not have a right to a jury trial. The court disagreed with defendants and on August 9, 1991, denied their motion to strike plaintiffs' jury demand.

The court now enters the following findings of fact and conclusions of law as would be required by Fed. R. Civ. P. 52 on those claims which are equitable in nature and treated as advisory under Fed. R. Civ. P. 39(c). These findings and conclusions are also necessary to resolve plaintiffs' requests for injunctive relief. If the Circuit Court decides the jury trial procedure was incorrect, this court anticipates the Circuit Court will proceed to review these findings and conclusions without the necessity of a remand. *See generally Hurwitz v. Hurwitz*, 136 F.2d 796, 799 (D.C. Cir. 1943); *Cuddy v. Carmen*, 694 F.2d 853, 859-60 (D.C. Cir. 1982); *McKinney v. Gannett Co.*, 660 F. Supp. 984, 991-92 (D.N. Mex. 1981); Fed. R. Civ. P. 52, 39(c); 11 Wright & Miller, *Federal Practice and Procedure* § 2887, pp. 296-97 (1973).

FINDINGS OF FACT

1. M-F is a Maryland corporation, a wholly-owned subsidiary, and it sold and distributed certain products manufactured by subsidiaries of Varity. It sells farm implements and related parts. M-F's principal place of business is in Des Moines, Iowa. Varity is a publicly-owned holding company and at all materials times had its worldwide headquarters in Toronto, Ontario, Canada. Varity controlled the activities of M-F at all relevant times.

2. M-F has for many years provided its employees and retirees basic health, major medical, life insurance, vision care, hearing care, and dental benefits under an "employee welfare benefit plan" within the meaning of 29 U.S.C. § 1002(1) and (3). These benefits are hereinafter collectively called "welfare benefits." The M-F plan was still in existence at the time of trial. It has never been amended or terminated by M-F or Varity in a manner eliminating welfare benefits. There are *no* pension benefit claims in this case.

3. These employee welfare plans at all relevant times were self-insured and administered through John Hancock.

4. These plaintiffs, while employed at M-F and Massey Combines Corporation ("MCC") were not a member of a union and were considered management "at will" salaried employees and were not covered by any collective bargaining agreement or other employment contract of any kind.

5. M-F has for many years also paid severance pay to terminated employees pursuant to a policy contained in its Personal Administration Manual ("PAM"). This policy is an "employee welfare benefit plan" within the meaning of 29 U.S.C. § 1002(1) and (3).

6. The Individual Plaintiffs' names, the number of years each worked for M-F, and the month and year they retired are as follows: John Altomare, twenty-one years, March 1983; Charles Barron, sixteen years, January 1986; Alexander Charron, twenty-four years, May 1983; Charlotte Chiles, ten years, February 1986; Anita Crowe, thirteen years, April 1986; Ray Darr, fourteen years, December 1986; Doris Guidicessi, seventeen years, February 1986; Barnett Lucas, twenty-three years, March 1985; Robert Skromme, eighteen years, February 1982; and Estate of Walter Smith, represented by his surviving spouse Vera Smith, twenty-four years, November 1985.

7. The Individual Plaintiffs worked for and retired from M-F, not MCC. None of the Individual Plaintiffs ever worked for MCC, except Anita Crowe, who came back from her M-F retirement to perform a one-time project for MCC. None of the Individual Plaintiffs authorized a transfer of the obligation

to pay welfare benefits from M-F to MCC. Defendants did not seek permission from any of the Individual Plaintiffs before attempting to transfer the obligation to pay welfare benefits from M-F to MCC. Each of the Individual Plaintiffs understood that M-F welfare benefits were to continue for life after retirement.

8. Charles Howe and Ralph Thompson are the class representatives for the MCC-Retired Class. They worked for M-F for 23 and 29 years respectively. Both "transferred" to MCC after May 9, 1986. They retired as salaried employees in December and June 1987 respectively. Each understood that employee welfare benefits would continue throughout their life or the life of their spouse, whichever was longer.

9. Patrick Mousel and Robert Wells are the class representatives for the MCC-Terminated Class. They worked for M-F for fourteen and twenty-seven years, respectively. After May 9, 1986, they "transferred" to MCC and they were employed as salaried employees on March 4, 1988. Both understood that persons terminated from either M-F or MCC for reasons beyond their control would receive a termination allowance (severance pay).

10. On March 4, 1988, MCC went into receivership (bankruptcy) in Canada. As a result, the individual Plaintiffs and the members of the Retired Class stopped receiving welfare benefits and the members of the Terminated Class lost their employment without termination pay. Varity and M-F maintain that only MCC was obligated to provide the welfare benefits to plaintiffs.

11. Varity began in the early 1980s to reorganize its operating entities along product as opposed to geographic lines. (Tr. 2254.) The Combines and Related Equipment ("CARE") Division and the Tractor Division were created in 1984 as part of this "divisionalization" process. (Tr. 2254, 2255.) The CARE Division manufactured and/or marketed the following products: combines, four-wheel drive tractors, wide-level disc harrows, balers, swathers and certain parts. (Tr. 614, 1304.) After the CARE Division was created none of these products

could be sold for a profit because of the distressed market conditions, except balers. A part of Project Sunshine[1] required MCC to sell the balers exclusively to M-F who in turn sold them for a profit. (Tr. 617, 741-47.)

12. Starting in 1982, there began an unprecedented decline in the sales of combine harvesters in North America, caused in significant part by an extreme depression in this country's agricultural economy. (Ex. 536(i).)

13. The CARE Division, which never was profitable, was a significant economic drag on Varity. (Tr. 617, 1304, 2948.) During the fiscal year ending January 31, 1985, the CARE Division lost $53.4 million, while other Varity divisions and subsidiaries earned $55.6 million. (Ex. 265E; Tr. 2933.) During the first three quarters of 1985 the CARE Division lost $35.4 million. Exs. 265E, 315; Tr. 2934-35.)

14. Varity's financial position in early 1985 was very precarious. (Tr. 3744.) The CARE Division's large losses threatened to break Varity's debt covenants. (Tr. 3799.) However, other segments of Varity's operations were profitable.

15. The losses incurred by the CARE Division led Varity in 1985 to consider company-wide financial restructuring, an essential part of which was spinning off the CARE Division into a privately-held Canadian corporation under Varity's control. (Ex. 23, p. 17; Tr. 2211.) That corporation ultimately became MCC. Varity named this project "Project Sunshine." (Tr. 2212.) Varity's goals for Project Sunshine were to reduce its debt burden to a manageable level (Ex. 274, p. 188), to restore financial stability to Varity, and to "protect and insulate" itself from further deterioration of the combines business. (Ex. 61; Tr. 736.)

16. The cornerstone of Project Sunshine was Varity's deconsolidation of its CARE Division to avoid showing on Varity's financial statements the large losses associated with that division. (Tr. 2265.) Varity achieved this goal by spinning off the CARE Division into MCC. (Ex. 316.)

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[1] Project Sunshine is discussed in detail in paragraphs 15-24 of this order.

17. In order to implement Project Sunshine, Varity could not create MCC unless the new company had some employees transferred to it. Furthermore, Varity wanted to rid itself of substantial obligations for employee benefits due or to become due both then working and retired employees. Defendants maintain that all plaintiffs resigned or were terminated from M-F and were hired by MCC as part of Project Sunshine.

18. Varity's financial statements were enhanced significantly by ridding itself of the CARE Division. (Tr. 809.) Making November 2, 1985 the effective date of Project Sunshine, even though the documents were not signed until May 9, 1986, enabled Varity to avoid showing approximately $54 million in fourth quarter losses associated with the combines business. Varity wanted to avoid showing this loss because it feared the reactions of creditors and investors. (Ex. 316, p. 8.)

19. The formation of a new company (MCC) in 1986 to manufacture and sell self-propelled combines and the four-wheel drive tractors was ill-conceived because of severe industry problems. (Tr. 2618.) The entire industry had experienced severe declines in both of these product lines throughout the 1980s. (Ex. 262.) The year 1986 was the all-time low for the industry sales of self-propelled combines. (Exs. 262, 536(i); Tr. 2622.) Varity was the only farm machinery manufacturer that deconsolidated its combines business during the 1980s. (Tr. 1264, 2651.)

20. Prior to May 9, 1986, Ivan Porter had worked for Varity or one of its wholly-owned subsidiaries for many years as a vice president, controller of its world-wide operations, and president of its CARE Division. (Tr. 1952.) Varity, by actions of its Chair and Chief Executive Officer Victor Rice, assigned ("seconded") Porter to the new MCC as its president and chief executive officer with the intent that he would return to Varity after two years. (Tr. 1957, 1961.) Porter remained an employee of Varity while working with MCC. (Ex. 36; Tr. 4367.) No other MCC employee and only a select few Varity employees knew of this arrangement. Varity provided

Porter a written indemnity agreement for his work with MCC. (Exs. 88, 89.) Varity originally promised Porter a $150,000 bonus if he returned to Varity after two years. (Ex. 36; Tr. 2219, 2250.) After Porter was asked to stay with MCC beyond two years, Varity increased the bonus to $250,000. (Tr. 2221, 2250.) Varity paid the $250,000 bonus to Porter after MCC went into receivership even though he did not return to Varity. (Exs. 36, 51, 80, 104.) Rice arranged Porter's severance package from Varity, not MCC, after MCC's receivership. (Ex. 104.)

21. While he was president and CEO of MCC, Porter retained an interest-free housing loan with Varity. (Tr. 1974.) He was granted an option to purchase 200,000 shares of Varity stock (which he exercised in 1988). (EX. 51; Tr. 1971.) He also remained in Varity's pension plan, stock option plan, and benefit plan, which provided his health and medical benefits and life insurance coverage. (Exs. 36, 51, 80, 104; Tr. 4151.)

22. Porter believed MCC had to participate in Project Sunshine for the best interests of Varity. (Ex. 155.) Porter received a $19,800 bonus from Varity after the Project Sunshine documents were signed on May 9, 1986. (Tr. 1997.)

23. Varity retained William Zinkewich (MCC's chief financial officer) and Tony Colvin (an MCC vice president) on its retirement plan for senior executives and provided life insurance coverage at Varity's senior executive levels. (Tr. 1979.) Varity indemnified Zinkewich for his work with MCC. (Tr. 1989, 4048, 4152.) Varity "rehired" Zinkewich within six months of the MCC receivership. (Tr. 4761.)

24. Despite financial statements indicating that MCC had an initial net worth of approximately $110 million, MCC was essentially bankrupt from the outset. (Exs. 264B, 312; Tr. 2912, 2916.) The fair market value of the MCC common stock was zero or nominal. (Ex. 264B; Tr. 2903.) As of May 9, 1986, MCC had incurred on its books approximately $54 million in losses even though it had not been in operation. (Ex. 312; Tr. 2909.) Inventory, receivables, and other assets that were transferred to MCC were overvalued by $46

million. (Ex. 313; Tr. 2913-14.) Rationalization and restructuring costs were underestimated. (Tr. 2913.) As a result of Project Sunshine, MCC incurred one-time costs of $24.2 million. Similarly, MCC's liabilities, including unrecorded pension liabilities, were underestimated. In sum, MCC had a negative net worth on the day it was created (May 9, 1986), with liabilities exceeding assets by at least $46 million. (Ex. 315; Tr. 2915-16, 2920.) MCC started on May 9, 1986, with only $15,000 cash. It immediately drew on a line of credit and began liquidating assets to generate cash. (Tr. 780.) MCC had little or no chance of survival from its onset. (Ex. 269B; Tr. 2493, 2618-19, 2925, 2952.)

25. As of May 9, 1986, the day of its creation, it was questionable whether MCC was a going concern. (Ex. 269B.) It was always unlikely that MCC was going to generate sufficient cash flow from manufacturing operations to pay off its debts and obligations. Although there were plans to produce combines in the future, the essence of the MCC business plan was liquidation of assets. (Tr. 2923.)

26. In the first month of MCC's existence, MCC executives, including Porter, openly discussed among themselves that MCC could not survive. The expression they used was, "that dog won't hunt." (Tr. 802-03.) All of MCC's officers, including Porter, agreed that MCC's chances of survival were not good. (Tr. 803-04.)

27. During its first year of existence, MCC lost approximately $88 million (as of January 31, 1987). During the first quarter of 1987 (February 1 to April 30), MCC lost $15 million dollars. MCC predicted a loss of $54 million dollars for the remaining three quarters of 1987 (May 1 through January 31, 1988). (Ex. 132; Tr. 4869-74.)

28. L. W. Templeton gave unchallenged testimony that Rice, Varity's Chairman and Chief Executive Officer, bragged to his peers that he had "unloaded his losers all in one wagon" through Project Sunshine. (Tr. 2652.) Templeton testified that Rice said he was "putting his big product losers, combines and four-wheel drives in [MCC]. He told us he was putting

his big losers, company stores in [MCC] and told us he was shifting several thousand retirees and their pension obligations into [MCC] and was delighted to be out from under all those obligations. Oh, yeah. He also told us that he got the lenders to agree to shove about $200 million worth of debt over into [MCC] off of [Varity]." (Tr. 2651-52.)

29. MCC assumed $282.4 (Canadian) million of long-term debt from Varity and M-F for inadequate consideration. (Tr. 752, 2030, 4863.)

30. Defendants "transferred" to MCC the obligation to provide welfare benefits for approximately 4,000 retirees, as well as the obligation to pay welfare benefits for the 1,500 CARE Division active employees. (Tr. 2001, 4932.) John Ruth, former president of M-F, testified the transfer "was absolutely cutting the throats for those 4,000 they allowed to go down the drain."[2] (Tr. 1512.) All of the retirees had worked for M-F, not MCC. The annual savings to defendants was in the millions of dollars. (Tr. 753-54.) These obligations were MCC's largest fixed costs. (Tr. 2061, 4934-35.) Defendants acknowledged in internal correspondence that it was in their best interest to have all the employees accept the transfer. (Ex. 47.)

31. Historically, M-F retail stores were a part of the Tractor Division, not the CARE Division. Nevertheless, they were transferred to MCC as a part of Project Sunshine because in 1984 and 1985 the stores were losing approximately $6 million a year. (Tr. 626-27, 647.) In order to avoid taking an accounting loss themselves, defendants forced MCC to take retail inventory that MCC did not want. (Ex. 155; Tr. 711-13, 727.) The inventory in the retail stores was transferred to MCC at book value. (Tr. 715-16.) The book value of the inventory was twenty to forty percent greater than the market value. (Tr. 711, 729.) Porter, the CEO for MCC, stated at the time of MCC's formation that the retail stores were "encumbered with this unwanted overvalued inventory," most of the

[2] Mr. Ruth is referring to retirees.

equipment was "junk," and important to "nurse our way through the problem in the best interest of M-F Limited [Varity]." (Ex. 155; Tr. 1361-62.) Porter viewed the retail stores as working "for nothing." (Ex. 155.)

32. Defendants required MCC to secure approval of M-F before MCC could sell equipment at below book value. (Tr. 719-20.) Reserves established (money supposedly set aside) by Varity to cover MCC's losses on transferred inventory sold below book value were not always paid promptly to MCC, causing cash flow problems. (Tr. 733.)

33. Prior to Project Sunshine, the parts business was part of the CARE Division. The defendants did not transfer the lucrative parts business from the CARE Division to MCC. (Tr. 734.) The parts business was very profitable, with a gross margin of fifty-two to fifty-five percent. (Tr. 748.) The absence of a parts business adversely affected MCC's cash flow, profit, and ability to supply MCC dealers with repair parts. (Tr. 749.)

34. Real estate located in Toronto, Ontario, Canada (called the King Street property) was valued in the millions of dollars and was a part of the CARE Division. However, this property was not transferred to MCC as a part of Project Sunshine. (Tr. 734-35, 749-50.)

35. After May 9, 1986, MCC was a private Canadian stock company, owned 45% by Varity, 35% by the Canadian Imperial Bank of Commerce, and 20% by the Canadian government. The Canadian Imperial Bank of Commerce and the Canadian government obtained their MCC stock in consideration of forbearance on loans to Varity as part of the debt restructuring of Varity accomplished through Project Sunshine. No new money was paid or loaned as part of the stock transactions. (Tr. 2020.)

36. MCC manufactured relatively few rotary combines during its existence. (60 Model 8560 in August 1986, 110 Model 8590 and 71 Model 8560 in March and April of 1987) (Ex. 575(k) at 3, Tr. 4214.)

37. Prior to May 9, 1986, MCC was owned completely by Varity and MCC's board of directors was comprised entirely of Varity employees. Varity employees created and executed all relevant Project Sunshine agreements for MCC. For example, Varity's in-house legal counsel, Robert Garland, signed the service agreements on behalf of both Varity and MCC and no independent counsel reviewed the documents for MCC. (Exs. 121, 122, 125, 140; Tr. 2379-81.) Also, M-F's in-house legal counsel, Ed Ludlow, signed the assignment and assumption agreement on behalf of both M-F and MCC without independent review for MCC. (Ex. 171.; Tr. 2382-84.) Defendants admitted MCC was not independent when the Project Sunshine documents were finalized. (Tr. 2248, 2264.)

38. After May 9, 1986, MCC had a five-member board. Varity, not MCC, indemnified the members of the MCC board. (Tr. 2224.) Varity's president, Vincent Laurenzo, was the chairman of MCC's board. Varity's senior vice president of finance and the director of Project Sunshine, Neil Arnold, was a member of MCC's board. Two seats were filled by a representative from the Canadian Imperial Bank of Commerce, Varity's largest lender, and a representative of the Canadian government. The fifth seat was filled by an employee of Wood Gundy, a Canadian investment bank, that did work for Varity and represented Varity during Project Sunshine. (Tr. 3836.) No officers of MCC were ever on its board. (Tr. 643, 4017.)

39. The CARE Division employees were referred to as MCC's employees after May 9, 1986. However, the employees who were transferred retained their M-F employee numbers. (Tr. 4724.) MCC and M-F shared the same physical location that had been and was at all relevant times M-F's United States headquarters. During the time MCC was sharing facilities with M-F, only the M-F name appeared on the building's marquee. (Tr. 762.) In addition, only the Massey-Ferguson name appeared on MCC's manufacturing facility in Brantford, Ontario, Canada. (Tr. 2050-51.) MCC and M-F had a common receptionist and telephone number, which was

answered "Massey-Ferguson." MCC began business using M-F's stationery. (Tr. 762-63.) With a few exceptions, MCC's products were sold by M-F dealers. The dealers maintained the existing "Massey-Ferguson" signs. "Massey" or "Massey-Ferguson" was the name on the combines sold by MCC. (Tr. 765-67.) MCC was totally dependent on the market goodwill of defendants. (Tr. 1496-97.)

40. MCC kept much of its insurance under the defendants' group policies. (Tr. 4877.)

41. Varity established an Operations Review Committee ("ORC") to monitor, review, and issue directives regarding the budget, expenditures, plans, policy, and performance of MCC. (Ex. 155; Tr. 707-08, 710, 797-98.) Rice, Varity's Chairman and Chief Executive Officer, and Laurenzo, Varity's President, both served on the ORC. (Tr. 2216.) Rice and Laurenzo hand-picked the other members of the ORC, all of whom were Varity employees. (Tr. 2392.) The ORC reviewed matters related to MCC's operations before those matters were presented to the MCC board. (Tr. 2264.)

42. Laurenzo met with Porter approximately twice a month during MCC's existence to discuss MCC operations. (Tr. 2259-60.) Porter consulted with Laurenzo in setting Richard Brown's salary as Vice-President of MCC. (Tr. 755-56.) Porter and Laurenzo also set criteria for paying bonuses to MCC executives. (Tr. 757-58.) Laurenzo was personally involved in the revision of MCC's business action plans. (Tr. 2261-62.)

43. MCC had a "cash management committee" comprised of Porter, Zinkewich, and Gary Stewart. This committee controlled all expenditures of cash by MCC. Stewart, who was MCC's treasurer, went to work for M-F prior to MCC's receivership.

44. At the insistence of Varity, MCC included in its budget unrealistic sales projections to match Varity projections upon which lenders relied in assessing the viability of Project Sunshine. (Exs. 67, 136; Tr. 787-89.)

45. Varity retained for two years the obligation to make up for shortfalls, up to $25 million, in MCC Canadian pension obligations.

46. Varity provided numerous services to MCC, including parts, warehousing, computer processing, management services, facilities, legal services, marketing, payroll services, and employee benefits services. (Tr. 2263-64, 2320-21.) Varity billed MCC for the services, but MCC did not always pay. (Tr. 2320.) At the time of the receivership, MCC owed Varity $6-7 million dollars in unpaid bills for services. (Tr. 4249, 4854.)

47. Ludlow (M-F) and his staff provided legal services to MCC. (Tr. 2370.) Garland (Varity) also provided legal services to MCC. (Tr. 2371.) MCC never had anyone on its own payroll who provided legal services. (Tr. 2371.)

48. Varity or one of its subsidiaries paid MCC officers during 1986. (Tr. 2258-59.) Varity still issued MCC—Vice President Brown's monthly paycheck until about mid-1987. (Tr. 756.)

49. Varity and MCC used the same benefit consultants. (Tr. 4901-02.) The benefit plan used by the defendants and MCC was administered by the same human resources department. All employees relied upon the same summary plan description and the same PAM. (Exs. 1, 114, 327.)

50. Even though Varity knew well before December 1987 that MCC was collapsing, Varity continued to extend retail financing to MCC on a "business-as-usual" basis. (Tr. 2230.)

51. At Varity's request, M-F paid some of MCC's suppliers. (Tr. 1509-11.) Varity also made advances for payroll, administration and trade fees, and accounts payable distribution. (Tr. 2943-44, 3087.)

52. Although M-F could put an MCC dealer on "COD", M-F was constrained by Varity from forcing MCC stores into bankruptcy because it would have brought down Varity's "house of cards." (Tr. 1532.)

53. In the fall of 1987, when Varity knew MCC was collapsing, MCC transferred back to Varity six of its most profitable retail stores. (Tr. 807-08.)

54. In October of 1987, Porter told MCC senior management that MCC was about to go into receivership, and recommended to some that they return to Varity or look elsewhere for employment. Porter did not give similar warning or advice to the rank and file. (Tr. 4402-04.)

55. In late 1987 Varity developed an "exposure minimization plan" to minimize Varity's exposure in the event that MCC went into receivership. (Tr. 2231-32, 2266.) Porter and Arnold were on the steering committee. (Tr. 2323-24.) Ludlow worked on the legal aspects of the plan. (Tr. 2375-76.)

56. Through its participation on the MCC board of directors, Varity participated in the decision to put MCC into receivership. (Tr. 2229.)

57. The court finds that MCC was never an independent legal entity separate and apart from defendants. Varity and M-F designed, created, and controlled every aspect of MCC throughout its existence.

58. Exhibit A ("Porter letter") and Exhibit B ("McAdams letter") contain the only written material explaining the formation of MCC directly provided to the Retired Class and the Terminated Class prior to their "transfers" from M-F. (Tr. 4909.)

59. The Porter letter went to the non-retail store employees and the McAdams letter went to the retail store employees. The information in the letters is identical.

60. The information contained in the Porter and McAdams letters included: a cover letter; an "acceptance" form; a transcript of the Porter videotape; a side-by-side comparison of the benefits between M-F and MCC; and a question-and-answer sheet.

61. In order to communicate this information to the CARE employees, defendants arranged various meeting sites in

North America. The only meeting site for plaintiffs was at M-F's corporate headquarters in Des Moines. All available employees met in a large meeting room where a video-taped message from Porter was shown. The tape lasted approximately ninety seconds. The Porter letter was then distributed. According to defendants, the entire meeting, which included viewing the Porter tape, receiving and reviewing the Porter letter, and signing and returning the acceptance of the transfers, was to last thirty minutes at the most. Defendants directed that the tone of the meeting was to be "as light, upbeat, and positive as possible." Defendants wanted to "encourage, all salaried employees to sign the acceptance . . . and to leave [the acceptance form at the meeting]." (Ex. 47; Tr. 4909.)

62. Defendants wanted to have all the employees sign the acceptance (Ex. A page 7) (which in effect transferred M-F employees to MCC) because they did not want to be responsible for the termination costs or the costs associated with the unfunded retirement benefits of employees who either were eligible to retire from M-F on or before May 9, 1986, or who would be retiring from MCC. (Ex. 47.)

63. Information given to the employees portrayed a positive economic outlook for MCC. For example, the Porter letter and the Porter video tape transcript state:

> We are all very optimistic that our new company has a bright future . . .
>
> * * *
>
> . . . we are doing many other exciting things designed to improve the profitability . . . of the business
>
> * * *
>
> This financial restructuring created Massey Combines Corporation and will provide the funds necessary to ensure its future viability.
>
> * * *

[Porter] Finally, despite the depression which persists in the North American economy, I am excited about the future of Massey Combines Corporation. Together we can exploit all available opportunities in the combines business. I look forward to working with you in the future to ensure the success of Massey Combines Corporation.

64. The question and answer sheet ("Q & A sheet") in Exhibits A and B contained eight questions and answers. Defendants developed these questions and answers in anticipation of the "many concerns" by the employees. Defendants purposefully made the questions and answers incomplete, confusing, evasive, and deceptive. Defendants developed more forthright questions and answers, but they opted not to publish them. (Exs. 42, 46, 47.)

65. Information in Exhibits A and B concerning benefits was very limited. That information included a side-by-side comparison showing that M-F's and MCC's benefits were identical. The only question dealing with benefits was number three. The answer simply stated that "benefit programs will remain unchanged." Defendants considered telling the employees that "initially" benefits would remain the same but that MCC would be reviewing the benefits and would notify the employees of any changes. Defendants rejected this disclosure because they believed it would cause the employees to reject the acceptance forms. Soon after the employees transferred to MCC, Varity began to develop "creative and innovative ways" to reduce employee benefits. (Ex. 67.)

66. Defendants did not include in the Q & A sheet certain questions that they knew the employees wanted answered. For example, the employees wanted to know whether they were eligible for termination pay from M-F. The employees also wanted to know if they could take early retirement from M-F. Defendants purposefully did not provide answers to these and other questions because they wanted the employees to transfer to MCC in order to avoid the liabilities associated with severance pay and retirement benefits. (Ex. 47.) Defendants' failures to make these disclosures were to the detriment of the Retired and Terminated Classes.

67. Defendants knew they should tell the employees that they claimed the right to amend or terminate benefits in retirement. Zinkewich wrote to Porter on April 15, 1986, as follows:

> The following proposal results because of the govt's and lenders insisting that in communicating with employees in the formation of MCC, that we are very explicit about maintaining our rights to modify benefits in the future, i.e., that there is no promise that the present benefits will be guaranteed forever. As a result we are faced with the awkward situation that the letter may not attract those employees who we would like to join MCC.

(Ex. 42.) Defendants ultimately decided to ignore the above set out proposal and not make the disclosure to the employees.

68. The representations made in the Porter and McAdams letters regarding the potential financial viability of MCC, MCC's business outlook, and the employee benefits were materially misleading. Defendants knew the representations were materially misleading when they were made. Plaintiffs relied on these representations to their detriment.

69. Project Sunshine was, as mentioned above, a scheme designed, in part, to rid defendants of the obligations to pay benefits to retirees and employees of M-F.

70. Defendants did not attempt to persuade the Individual Plaintiffs to transfer to MCC; rather, defendants unilaterally assigned the Individual Plaintiffs and the obligation to pay their benefits to MCC. The Individual Plaintiffs were not aware that this had occurred until the receivership of MCC. Defendants did not unilaterally assign to MCC their obligation to provide welfare benefits to retirees from the Tractor Division. Those retirees are still receiving welfare benefits under the M-F Plan.

71. M-F maintained an employee benefits package that was intended to attract and retain employees. (Tr. 2220.) M-F described the benefits package to its employees by distributing a three-ring booklet entitled *You and Massey Ferguson* (*"You and M-F"*), which after January 1, 1982 contained Section I. (Exs. 114, 327.) *You and M-F* was written in language designed to be understood by a person with a sixth-grade education. (Tr. 1692.) It contains well over two hundred pages of material.

72. M-F intended that each employee have a copy of *You and M-F* and rely on it for information about benefits. (Ex. 114; Tr. 469.)

73. *You and M-F* was updated from 1974 through 1981 by sending an announcement to the employees followed by replacement pages to be inserted by the employee and instructions that the pages being replaced were to be removed. (Tr. 1314.) John Ruth, president of M-F from 1982 to 1987, never instructed anyone at M-F to end this procedure and he assumed the procedure continued while he was president. (Tr. 1314.)

74. During their employment with M-F and prior to May 9, 1986, plaintiffs were all given a copy of *You and M-F*. They were told they should look to *You and M-F* to determine the employee benefits they were entitled to, including retirement benefits. Some plaintiffs had been told by defendants' representatives that *You and M-F* was the "Benefits Bible."

75. *You and M-F* was first published in 1974. There was no statement in the book about a claimed reserved right to amend or terminate the benefits in retirement. In October of 1978 M-F changed from an insured plan to a self-insured plan and as a part of that transaction adopted the Massey-Ferguson, Inc. Employee Benefits Plan and Trust ("M-F Employee Benefits Plan" or "M-F Plan"). Section 7.4 of the M-F Plan provided that M-F reserved the right to amend or terminate the benefits. This provision was the focal point of *Howe I*. Because of the adoption of § 7.4, M-F had the legal duty to provide each employee by the end of 1978 an updated *You and M-F* that

contained, "in a manner calculated to be understood by the average plan participant [employee]," notification of M-F's claimed right to amend or terminate the benefits. 29 U.S.C. §§ 1022(b) and 1024(b)(1). Also, M-F had the legal duty to provide each employee by July 31, 1979, a summary description of the change in the M-F Plan notifying the employees that M-F reserved the right to amend or terminate the welfare benefits. 29 U.S.C. § 1024(b)(1). In addition, M-F had a legal duty to provide each employee by the end of the year in 1983 an updated *You and M-F* containing all plan amendments made within the preceding five-year period, especially including appropriate notification of M-F's claimed right to amend or terminate the plan. 29 U.S.C. §§ 1022(b) and 1024(b)(1). Furthermore, MCC had a legal duty to provide within ninety days of May 9, 1986, each of its employees with a summary plan description (such as *You and M-F*), which again would have been required to contain a provision properly notifying the employees of MCC's claimed right to amend or terminate the benefits. 29 U.S.C. § 1024(b)(1). Defendants and MCC failed to comply with every one of these legal notification requirements.

76. At MCC the Retired Class continued to rely on *You and M-F* for information about their benefits. (Tr. 479.) They were never told to stop relying on *You and M-F*. (Tr. 479.) No summary plan description was published for MCC employees. (Tr. 4918-19.)

77. *You and M-F* contained the following statements:

> The company has a total compensation policy which keeps pace with industry and is considered to be among the best. This booklet summarizes the various life, health, and disability insurance policies and the retirement income plan for salaried employees. These benefits represent a significant element of compensation in addition to your paycheck since they relieve you of putting aside a part of your cash income to take care of health problems and to provide for your survivors or for your own years in retirement.

Section I. p. 8

When you retire from the Company you take with you a number of benefits from your employment—

* * *

— basic health benefits

— major medical benefits

— dental health benefits

— vision care benefits

— hearing aid benefits

— non-contributory life insurance, 150% of final annual rate of earnings to age 65—then $3000

— life insurance from your contributory policy, if applicable

Section VIII, p. 5.

The basic health, major medical, dental health, vision care, and hearing aid benefits for Company employees continue in retirement. About 3 months before your 65th birthday, you are expected to enroll in the Part 'B' of the social security Medicare program which provides medical insurance in addition to the hospital insurance provided under Part 'A'. At this time the Company will assume you are covered by Medicare, and the Company health benefits will take responsibility for only those covered expenses not covered by Medicare. At the same time, the Company will reimburse you, in your monthly pension check, for the Medicare Part 'B' premium which is deducted from your monthly social security check.

It is your responsibility to inform the Company when your spouse attains age 65 and enrolls in Medicare Part 'B' in order that the Company may reimburse you for the cost of your spouse's Medicare deduction from monthly social security income. It is also your responsibility to advise the Company in the event of the death of your

spouse, so that the Company's reimbursement for Medicare is adjusted.

Section VIII, pp. 7-8.

Coverage under the group benefits plan—basic health and major medical—

1. continues for employees who retire as pensioners and their dependents;
2. continues for surviving dependents of a retiree;

Section IV, pp. 12-13.

Vision Care Insurance continues for employees who retire as pensioners and for their dependents.

Section IV, p. 16.

If you work beyond your 65th birthday, your non-contributory life insurance continues in force until you retire when, effective at midnight of the last day of the month prior to the day pension begins, $3,000 remains in force for the rest of your life, payable to a beneficiary or estate.

Section II, p. 2.

Life insurance coverage in retirement continues to be paid for by the Company.

. . . .

If you enroll in the contributory life insurance plan when you are first eligible, within 31 days of hire, OR participate in it for at least 15 years before retirement, you continue to be insured in retirement at no cost to you.

In retirement before age 66, the insurance continues in force at 50% of your final annual rate of earnings and is reduced by 5% per year on your 66th, 67th, 68th, 69th, and 70th birthdays. The reduction is effective at midnight at the close of the birthday. If you retire at age 66

or later, the insurance coverage drops to the level designated by your last birthday. At age 70, then, insurance equal to 25% of your last annual rate of earnings is still in force and remains in force for the rest of your life, payable to your beneficiary or estate at time of your death.

Section II, p. 3.

The dental health plan covers all full-time salaried employees, retirees, and eligible dependents.

Section V, p. 1.

78. The Retired Class and the Individual Plaintiffs understood from this language in *You and M-F* that if they worked for defendants until retirement, they would have the stated insurance coverage for the rest of their lives at the levels being provided to them on the date of their retirement. (Tr. 474.) Other witnesses including those not seeking insurance benefits testified similarly. Ruth, M-F's former president and not a party here, understood M-F did not have a right to terminate benefits for employees who had already retired from the company. (Tr. 1318.) Ruth understood that if he had retired, he would have received insurance benefits for the rest of his life. (Tr. 1315.) Robert Wells, who worked for a number of years in the personnel department and human resources department for M-F and a person who was well acquainted with such problems, (Tr. 3217) understood that once an employee retired, his or her benefits would continue for life. Richard Brown, an officer of M-F and later an officer of MCC, understood that health benefits would continue for life after retirement. (Tr. 818.) Plaintiffs' expectations and understandings were reasonable given the language in *You and M-F*.

79. Jenivie Jack is a person who had worked in the area of benefits and was the person who had gathered the information and wrote the original version of *You and M-F*, which was reviewed by persons in M-F's personnel and human resources departments. (Tr. 1689.) She understood, based on information from the benefits department and the past practices of the

company, that retirement benefits would continue for life. (Tr. 1695-96.) Jack believed that she would have her insurance benefits for life after retirement, and she has continued to receive her benefits from M-F since her retirement in February in 1982. She was not transferred to MCC.

80. M-F's intent to continue benefits for life after retirement was confirmed by past company practice. Defendants were reluctant to attempt to change existing retiree benefits. (Tr. 4053.) From at least 1971 until 1984, benefits for United States salaried retirees were never reduced or terminated. (Tr. 4714.) A January 1, 1984 change in benefits was the only reduction ever made applicable to benefits of existing retirees, and that reduction was minimal. That change was not communicated to existing employees, but only affected retirees. (Tr. 4685.) As a result, the plaintiffs were never on notice that the defendants had on one occasion reduced benefits for existing retirees. Former president Ruth had participated in a series of conversations over a period of several years where it was expressed that M-F could not reduce benefits for people who had already retired. (Tr. 1594-95.)

81. The Individual Plaintiffs and the Retired Class were not informed prior to retirement that their benefits might be terminated by the company. (Tr. 2739.) To the contrary, employees received letters setting forth that certain benefits would continue in retirement. (Ex. 184, p. 243; Tr. 489.)

82. After members of the Retired Class had transferred to MCC and after they had communicated to MCC their decision to retire, they received a post-retirement letter which contained a statement that the welfare benefits were subject to change or termination during retirement. However, these letters were received *after* the employees had completed their employment with defendants.

83. Defendants never distributed the M-F Plan to M-F employees. The Retired Class and Individual Plaintiffs never saw the M-F Plan or its §7.4 (reservation of rights clause) (Ex. 156; Tr. 479.) The few who did see the M-F Plan were all working in the benefits department. However, there were even

people who were working in the benefits department who never saw the M-F Plan and never knew such a plan existed. Top officials including Porter (Tr. 4261.), Ruth (Tr. 1319.), Brown (Tr. 823.), and Jack, author of *You and M-F* and updates thereto, never saw the M-F Plan. (Tr. 1696-1700.) Since these officials were not aware of the reservation of rights clause it is appropriate to find that the rank and file employees were not either.

84. There is nothing in *You and M-F* that informs employees that the company could terminate welfare benefits after retirement. (Tr. 1695.) *You and M-F* does not and never did contain a reservation of the right to terminate benefits. (Tr. 478.) Jack was never told to revise *You and M-F* to include a reservation of the right to terminate. (Tr. 1697-1700.)

85. Defendants have failed to point out any language in *You and M-F* that advises plaintiffs that the company had reserved the right to terminate welfare benefits after an employee retired. Rather, defendants point to language on page 4 of Section IX of *You and M-F* (page 208 of the booklet) that tells plaintiffs they have a right to examine and obtain copies of (at a reasonable charge) all plan documents at the plan administrator's office. There is no description of the plan documents. A reasonable person could conclude the reference on page 208 of the booklet was to *You and M-F* as they were unaware of any other plan or plan documents. Furthermore, it would not have been sufficient or effective to have given a copy of the M-F Plan to each employee because as defendants' benefits communication expert witness Louise Fitzgerald testified it would have been an ERISA violation to give the plaintiffs a copy of the M-F Plan in substitution for the summary plan description. She also testified it would not have been realistic to have expected that the employees would have been able to understand the terms of the M-F Plan.

86. *You & M-F* does contain an ERISA statement of rights notifying participants of the existence of a governing plan document and a statement alerting participants of the company's control over the plan:

STATEMENT OF RIGHTS

As a participant in the Massey-Ferguson welfare, pension, and savings plans for salaried employees you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all plan participants shall be entitled to:

> Examine, without charge, at the plan administrator's office and at other specified locations all plan documents and copies of all documents filed by the plan with the U.S. Government.
>
> Obtain copies of all plan documents and other plan information upon written request to the plan administrator. The administrator may make a reasonable charge for the copies.
>
> Receive a summary of the annual financial report of the Pension Plan and of the Savings Plan. The plan administrator is required by law to furnish each participant with a copy of each of these summary annual reports.

* * *

Massey-Ferguson Inc. is the plan sponsor and administrator of the Company's pension, savings, and welfare plans. The plan sponsor has *control* over the plans and the administrator is responsible for administering the plans. (emphasis in original)

87. Over the years 1981 to 1986, M-F changed and/or decreased the level of benefits to employees and/or retirees, by decreasing the benefits or by raising the cost to the employee or retiree, and informed employees and/or retirees of those changes in written communications.

88. In December 1981, M-F amended its health benefits plan to require from active employees contributions toward the cost of health benefits, effective January 1, 1982. This was part of a 10% decrease in fringe benefits to employees.

This modification was communicated to employees through a December 1981 memorandum from Victor Rice (Ex. 554), a January 1982 memorandum from Byron Quandt, an M-F employee specializing in benefits, (Ex. 506), and a December 1981 insert for *You and M-F* (Ex. 503). (Tr. 539, 1803-06.)

89. January 1983, M-F amended its health benefits plan to require a deductible dollar amount to be satisfied before claims would be covered. In addition, dental coverage was reduced 50%. This modification was communicated to employees through a January 1983 memorandum from Gary Fryatt (Ex. 509). Replacement or addition pages to insert in *You and M-F* were not prepared. (Tr. 1480-81.)

90. In December 1983, M-F amended its health benefits plan to adopt a new Comprehensive Major Medical Plan for employees and retirees. The Comprehensive Major Medical Plan required no contributions but required higher deductibles and introduced coinsurance. This modification was communicated to employees and retirees through December 1983 memorandum from John Ruth, a December 1983 memorandum from Byron Quandt and a booklet entitled The Massey-Ferguson Inc. Comprehensive Major Medical Plan. Replacement or addition pages to insert in *You and M-F* were not prepared. (Exs. 284, 585, 511, 512; Tr. 895-96, 1814-15, 3680-81, 3697-98, 5120, 5213-14.)

91. The Massey-Ferguson Inc. Comprehensive Major Medical Plan booklet provides in solid capital letters at the Schedule of Benefits Summary:

> THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES OF COVERED INDIVIDUALS AT ANY TIME.

92. The written communications referenced above, including the December 1983 memoranda and attached Massey-Ferguson Inc. Comprehensive Major Medical Plan booklet describing changes in welfare benefits for employees and

retirees constituted Summaries of Material Modifications within the meaning of ERISA.

93. Defendants failed to adequately communicate in the Ruth Memorandum, (Ex. 585) which was distributed to employees in December of 1983 or January of 1984, that the company reserved the right to terminate benefits in retirement. The reservation of rights language on the bottom of page 7 of the Ruth memo is ambiguous and was not reasonably calculated to inform the average employee of M-F's claimed reserved right to terminate benefits in retirement. (Ex. 511; Tr. 1484.) Ruth testified that M-F did not intend by this language to inform employees that the company had a right to take benefits away after they had retired. (Ex. 511; Tr. 1597.) A reservation of the right to terminate benefits being provided existing retirees would have been a major change in company policy, yet it was not listed as a "major feature" in Ruth's December 1, 1983 memorandum to employees. (Ex. 585; Tr. 1596.) The Comprehensive Major Medical Plan involved only minor changes in insurance coverage. (Tr. 1431.) The reservation of rights language appears only in the major medical document and does not indicate it applies to the other welfare benefits. (Ex. 511; Tr. 5011.)

94. Although an identical memorandum ("Quandt memo") (Ex. 512) was distributed to retirees, Jack, the compiler and author of *You and M-F* and the Individual Plaintiffs who received this memorandum did not understand it to mean that benefits could be terminated. (Tr. 1837-38.) The Comprehensive Major Medical Plan involved only minor changes in insurance coverage, such as the implementation of coinsurance for major medical expenses. (Tr. 1431.) Consequently, the Individual Plaintiffs who did receive this memorandum still believed that their benefits in retirement would continue for life. (Tr. 1837.) The Retired Class did not receive notice that the change was made applicable to persons who had already retired. (Tr. 4714.)

95. Neither the Ruth memo nor the attached Comprehensive Major Medical Plan contain any language informing

employees that they should stop relying on *You and M-F*. (Ex. 511; Tr. 4723.)

96. It was the defendants' intent to reissue the Comprehensive Major Medical Plan in the format of the *You and M-F* so that the employees could insert the pages in *You and M-F*. (Tr. 4724.) Jill Wellman, the general benefits administration manager of MCC for salaried employees, and others were working on revisions to *You and M-F* in 1984 after the Ruth memo was distributed. (Tr. 4724.) The changes to the existing medical benefits as a result of the Comprehensive Major Medical Plan were never published for inclusion in *You and M-F*. (Tr. 4724.)

97. A reasonable person, if he or she received and read the Comprehensive Major Medical Plan, would not understand it to be a notice that defendants were reserving a right to terminate welfare benefits in retirement.

98. MCC did not adopt an employee benefits plan until May 1, 1987, when it adopted the M-F Plan as its own. (Ex. 535.) Before May 1, 1987, MCC used the M-F Plan. (Tr. 4917.) The only plan produced at trial was the M-F Plan. (Ex. 156.)

99. *You and M-F* does not contain language that authorized defendants to transfer or assign any M-F employee or retiree to another company or plan.

100. Defendants did not otherwise communicate to plaintiffs that defendants claimed to have reserved a right to amend or terminate welfare benefits in retirement.

101. Retiree plaintiffs reasonably held the belief that the welfare benefits described in *You and M-F* were to continue unchanged for the lifetime of retirees.

102. The Termination Allowance Policy in existence at M-F at all times relevant to this action is contained in the PAM. (Exs. 1, 6, 7.) The purpose of the termination allowance policy was to allow the defendants' employees some time to find another job when the company terminated them for a reason

beyond their control. (Tr. 4700) Under the policy, eligible employees would receive one week's pay for each year of service up to ten years and two weeks' pay for every year of service thereafter subject to a maximum of fifty-two weeks' pay. (Ex. 7; Tr. 2450, 3247.) This was the termination allowance policy in effect at M-F just prior to the creation of MCC. (Tr. 3241.) MCC adopted this termination allowance policy and the balance of the PAM. (Tr. 3241, 4695.) There is no dispute that a Termination Allowance Policy was in effect on March 4, 1988.

103. The Termination Allowance Policy stated that:

> It is the practice of the Company to provide a measure of income protection for full-time salaried employees in the event of their separation for reasons beyond their control.

(Ex. 7; Tr. 3242.) Defendants' expert witness on termination pay, Walt Winder, testified that receivership constitutes separation for reasons beyond an employee's control. (Tr. 5269, 5293.) Members of the Terminated Class understood that through this language in the PAM, defendants promised that if plaintiffs were terminated for reasons beyond their control, they would receive termination allowance.

104. At a prior time when the defendants' Detroit manufacturing operation was closed down, M-F paid termination allowance to salaried employees who lost their jobs. (Tr. 4730.)

105. Pursuant to the termination allowance policy, persons who are classified as "termination-release" are entitled to receive termination allowance. (Ex. 6; Tr. 3263.) Termination-release is the "nondisciplinary termination by company option." (Ex. 7; Tr. 3244.) The categories listed under "termination-release" are not exhaustive nor exclusive. (Tr. 5269, 5291.)

106. Severance pay for those employees terminated at MCC was to be calculated based on the employee's total years of service with all M-F companies. (Tr. 5247.)

107. A memorandum from Porter dated October 21, 1987, attempted to amend the Termination Allowance Policy for MCC. (Ex. 86.) Porter reduced severance pay for people working for MCC in the event that their employment was to be terminated. (Tr. 4400.)

108. Porter's memorandum states that "[w]ith immediate effect the existing Termination Allowance Policy is rescinded and an amended policy is substituted in its place. The following is a summary of this amended policy." No amended policy was ever produced prior to MCC closing. There is nothing in the memorandum indicating MCC reserved any right to terminate the policy. (Ex. 86; Tr. 5295.)

109. Porter's October 21, 1987 memorandum (Ex. 86) states "[t]he decision to revise the termination policy is one of several actions being undertaken to maintain the viability of the company within the industry." This statement was untrue. On October 6, 1987, a couple of weeks earlier Porter told Brown that MCC "wasn't going to make it" and that Brown "better start looking" [for another job]. (Tr. 804-05.) Furthermore, by this time MCC had broken its borrowing base covenant, which allowed creditors to put MCC into receivership. In August 1987, Porter wrote Rice a handwritten memorandum in which he predicted MCC's "final rites (i.e. restructure, wind-up, sale)" would be finalized by the summer of 1988. (Ex. 88.) Varity's employees were actively plotting how to conceal MCC's inevitable demise from the Canadian Government during September 1987. (Tr. 4107-08.)

110. Defendants' conduct in designing and implementing Project Sunshine was willful, wanton, malicious, and in bad faith vis-a-vis all plaintiffs.

111. M-F was a fiduciary with respect to the M-F Employee Benefits Plan. M-F's board of directors was the M-F Plan's "named fiduciary" within the meaning of 29 U.S.C. § 1002(21)(A). (Ex. 156, p. 16.) Also, M-F was the "administrator" and "sponsor" of the Plan within the meaning of 29 U.S.C. § 1002(16)(A) and (B).

112. Varity was a fiduciary with respect to the M-F Plan because Varity at all times controlled M-F.

113. M-F was a fiduciary with respect to the MCC Employee Benefits Plan, to the extent it existed apart from the M-F Plan, because MCC simply adopted the M-F Plan in its entirety. Including the SPD, the actual plan language itself and common administrators. (Ex. 535.) M-F was a named fiduciary of M-F plan, and was also a fiduciary with respect to the MCC Employee Benefits Plan. (Exs. 156, 535.)

114. It necessarily follows then that Varity was a fiduciary with respect to the MCC Employee Benefits Plan because Varity was a plan fiduciary of the plan adopted by MCC.

115. After MCC went into receivership, defendants repurchased the conventional combine technology and the combine unique parts from MCC's receiver at bargain prices. Defendants began selling combines manufactured by third-party producers within one year of MCC's receivership.

116. After Project Sunshine, Varity was profitable. Varity's net income was $81.7 million for fiscal year 1988; $92.1 million for fiscal year 1989; and $101.5 million for fiscal year 1990. Varity's net worth at the close of fiscal year 1990 was $786.4 million. (Ex. 274A.)

117. The value of past benefits lost by the Retired Class is $696,195. (Ex. 310.)

118. The value of benefits lost by the Terminated Class is $1,536,117. (Ex. 269.)

119. The value of past benefits lost by the Individual Plaintiffs as of the time of the trial were as follows:

John Altomare	$ 5,000
Charles Barron	3,160
Alexander Charron	7,661
Charlotte Chiles	13,106
Anita Crowe	11,877
Ray Darr	1,700
Doris Guidicessi	8,219

Barnett Lucas	3,150
Robert Skromme	18,284
Estate of Walter Smith	10,655

(Ex. 270C.)

Insofar as the court stated facts in the introduction to these findings and conclusions or states additional facts below as part of the conclusions of law, those facts are found pursuant to Fed. R. Civ. P. 52(a).

CONCLUSIONS OF LAW

LAW OF THE CASE

For a discussion on the Law of the Case Doctrine see this court's order on motion for judgment as a matter of law and motion for new trial pages 5-8 [28a-30a], where all arguments in relation to Law of the Case are denied.

ALTER EGO

Throughout the course of this litigation the plaintiffs have argued that MCC from its inception was designed to fail. Plaintiffs maintained that MCC was a vehicle of disposal for Varity in reducing its debt and heritage cost[3] burdens. Plaintiffs seek a determination that defendants were at all times the alter egos of MCC and therefore responsible for their obligations.

In the context of ERISA, the Eighth Circuit has employed a five-factor test in deciding when to disregard the corporate form. *Contractors, Labors, Teamsters & Engineers Health & Welfare Plan v. Hroch*, 757 F.2d 184, 190 (8th Cir. 1985). A district court may disregard the corporate form if: (1) the corporation is undercapitalized; (2) without separate books; (3) its finances are not kept separate; (4) the corporation is used to promote fraud or illegality; and (5) the corporation is merely a sham. *Id.* The First Circuit in *United Elec. Workers*

[3] Heritage costs are those costs associated with retiree benefit obligations.

v. 163 Pleasant Street Corp., 960 F.2d 1080, 1092-93 (lst Cir. 1992), while citing *Hroch* adopted a three factor test when determining when it may be appropriate to disregard corporate separateness in an ERISA-related dispute. Those factors are: (1) whether the parent and the subsidiary ignored the independence of their separate operations; (2) whether some fraudulent intent existed on the principals' part; and (3) whether a substantial injustice would be visited on the proponents of veil piercing should the court validate the corporate shield. *Id.*

The court considers whether the entities have a "substantial identity in terms of corporate ownership, management, business purpose, operation, equipment, customers, and supervision." *Greater Kansas City Laborers Pension Fund v. Thummel*, 738 F.2d 926, 929 (8th Cir. 1984).

Continuity of the work force is also a relevant consideration. *Id.* Courts also look to additional factors to determine alter ego liability when a subsidiary corporation is created, they include:

(1) common stock ownership between the parent and the subsidiary;

(2) common directors and officers;

(3) common business departments between the parent and subsidiary;

(4) whether the parent and subsidiary file consolidated financial statements and tax returns;

(5) has the parent financed the subsidiary;

(6) did the parent cause the incorporation of the subsidiary;

(7) whether the subsidiary is undercapitalized;

(8) has the parent paid the salaries and other expenses of the subsidiary;

(9) whether the subsidiary receives business other than the parent's business;

(10) has the parent used the subsidiary's property as its own;

(11) whether the daily operations of the corporations are kept separate; and

(12) whether the subsidiary has observed the basic formalities.

United Steelworkers of America AFL-CIO-CLC v. Connors Steel Company, 855 F.2d 1499, 1505 (11th Cir. 1988). However, not all mentioned factors have to be present. *Id.* Rather, the court must look to the totality of the circumstances. *Id.* "[T]he degree of injustice that would be visited on the litigants by recognizing the corporate identity" must be considered in ERISA actions. *Alman v. Danin*, 801 F.2d 1, 4 (1st Cir. 1986). The *Alman* court stated:

> Congress enacted ERISA in part because many employees were being deprived of anticipated benefits, which not only reduced the financial resources of individual employees and their dependents but also undermined the stability of industrial relations generally . . . Allowing the shareholders of a marginal corporation to invoke the corporate shield in circumstances where it is inequitable for them to do so and thereby avoid financial obligations to employee benefit plans, would seem to be precisely the type of conduct Congress wanted to prevent.

Id. at 3-4 (citing 29 U.S.C. section 1001).

When examining the above-listed tests and keeping in mind the following facts the court concludes that defendants were the alter egos of MCC:

1. As conceived, MCC was not a viable business entity, but rather was envisioned as a means by which defendants could rid themselves of corporate debt, overvalued inventory, unprofitable stores, and expensive employee benefit obligations. Profitable segments of what logically would have been part of

MCC's business, and desirable assets, were retained by defendants.

2. The creation of MCC was overseen and undertaken by employees and attorneys of Varity, ostensibly acting for both sides of the transaction.
3. MCC retained employees who had worked for MF by persuading them to join MCC instead of taking early retirement, termination, or other transfer from M-F. The tools of persuasion employed included deliberate misrepresentations, half-truths and omissions.
4. On May 4, 1986, the first day of MCC's legal existence, the company was on the verge of bankruptcy. It began liquidating assets immediately.
5. Varity controlled MCC's board of directors.
6. MCC's senior executive officers were controlled by Varity. Ivan Porter, while president of MCC remained an employee of Varity. This "secondment" was not made known to any of the plaintiff class.
7. MCC and MF shared business facilities, which by all outward appearances were MF facilities.
8. Varity controlled MCC's business through its ORC.
9. Although Varity and MCC billed each other for services each provided to the other, the services were not always paid for. Indeed, Varity and MCC shared facilities and business departments including legal, patent, tax, accounting, management, information systems, parts supply and warehousing, parts sales and marketing, treasury, internal audit, expert sales, retail credit and financing.
10. Defendants and MCC did not observe basic corporate formalities in several significant respects. Intercompany accounts were not reconciled. Employee benefits were administered by the same human resources department, and all employees of both

defendants and MCC relied upon the same plan documents.

11. When it appeared MCC would be going into receivership, Varity exercised its control of MCC's affairs by taking back MCC's desirable assets and implementing a plan to minimize Varity's exposure.

In support of its alter ego theory plaintiffs called Yale Kramer as an expert witness.[4] The court finds Mr. Kramer's testimony credible and enlightening. A brief excerpt of his trial testimony is therefore warranted here:

Q . . . You have testified, Mr. Kramer, that Massey Ferguson, Ltd., before the creation of Massey Combines Corporation was facing serious financial problems; is that correct?

A Yes.

Q What options does a company facing financial problems such as those being faced by Massey Ferguson, Ltd., have, based on your knowledge and expertise to try to remedy those problems?

A Well, every company in the industry was having terrible financial problems. The industry had really deteriorated and the question of whether it was going to come back at any time soon was discussed in the industry. Different people had different opinions. The clear circumstances as evidenced by the one chart we had up there, I believe the last one showed that

[4] Mr. Kramer is the president of Reiss Corporation and also the president of K. R. Business Brokers. He is a licensed attorney and a certified public accountant and has formerly served as an investment banker. The Reiss Corporation is involved in the valuation of closely held businesses and business interests. Mr. Kramer was formerly vice president of corporate finance for R. G. Dickinson Company, which is a regional investment banking firm where he was in charge of the corporate finance department. He was involved in negotiating mergers and acquisitions. Prior to working for R. G. Dickinson, Mr. Kramer was with Peat Marwick Mitchell, where he was a tax specialist.

Massey Combines or the CARE Division which became Combines was losing very substantial sums of money each year.

Financial information in the Project Sunshine documents, and the proxy materials and the annual report said that the management expected losses to continue at approximately the same level, at least for the near future. The CARE Division was in great trouble. The rest of the company was having difficulty as those—the charts showed they were making money here in the last two years, but the CARE Division was a real drag on them.

Q Given the circumstances then, again, based on principles of the area of your expertise, what options would they have had?

A They could close it down, liquidate the assets. They could sell off as much as they could as a business. Chances of doing that were fairly slim. I mean they might be able to sell off some of the assets, but they couldn't get rid of all those liabilities or they could do something like they did here, a reorganization where they put some assets and some liabilities into an affiliated company for the purpose of hiding the losses.

Q Now, the first thing you mentioned close down, is that, like, discontinue the CARE Division? Is that what you're really talking about?

A Basically, that's what they did in a two-step process. Instead of selling off the assets and paying off liabilities in Massey-Ferguson, Ltd., what they did was put it into a separate corporation, then selling off the assets and start paying off some liabilities.

Q Now, if they had done it just by closing down and discontinuing, what would have been different, if anything, for Massey-Ferguson, Ltd./Varity than the way it was creating Massey Combines?

A Well, first of all, there would have been very substantial losses that would have appeared on the books of Massey-Ferguson, Ltd., that the way it was handled did not appear.

Second, there would have been substantial write-downs of asset values and those write-downs wound up happening to Massey Combines rather than Massey-Ferguson, Ltd. The effect of some of these things was just to hide from the public what was really happening.

Q What would have been different, if any with regard to obligations to employees and or retirees if they had just discontinued and closed down the CARE Division?

A Well, they would not be standing behind a corporate shield. They would have had to treat those employees and retirees as any other employees and retirees within the company.

* * *

Q What opinion, if any, do you have based upon recognized methods of conducting business that you've learned in connection with valuing business as to this selection of this option by Massey-Ferguson, Ltd.?

A If you put aside questions of ethics or morality and look just at the financial, it was a brilliant plan. Massey-Ferguson, Limited, was able to avoid showing very substantial losses. They were able to avoid paying some liabilities passed to Massey Combines. They are able to avoid the negative connotations of going out of business, they avoided some pension liabilities.

They accomplished quite a few things, and financially speaking, it was a brilliant plan. It was devised by financial people who knew how to use the rules. For example, by making this affiliated company less

than fifty percent owned by Massey-Ferguson, they avoided showing the losses. If they owned one hundred percent of that subsidiary, it would have had no effect as far as showing the losses.

They used accounting rules with the reduction in liabilities by using the Canadian accounting treatment. The SEC, the U. S. Securities and Exchange Commission, requires that retractable, redeemable preferred stock not be treated in the equity section so by using Canadian—making a Canadian corporation following Canadian principles, using redeemable preferred stock, they made all of that look like equity when the SEC wouldn't allow them to do that if they had been a U.S. company under the SEC rules.

Q Let me follow up with another question. What opinion, if any, would you have had with regard to the method that they used if it was to be represented as a creation of an ongoing company that was going to be operating company for some period of time into the future if it was represented in that fashion?

A Well, I think that's very, very questionable. Questionable whether it could be ongoing, the amount of debt they had. In the business lines that they were in, they couldn't service the debt, they weren't producing. They had so many, many employees that they were going to be retiring or discharging. They had all these retirees that were transferred in there that I believe there was four times as many retirees as there were employees in the company, and then they were going to lay off more people.

Chances of this company being successful were very, very small, they were not independent in that they had been controlled and continued at least they were obligated under the restructured plan to have all this debt and all this other stuff, they were not independent. And as far as a stand alone, there was no way

they could stand alone under the circumstances, and they didn't stand alone.

Q Based upon your knowledge and experience and background, do you have an opinion as to whether or not a reasonably prudent businessman would represent the creation of Massey Combines Corporation as a stand alone company independent of Massey-Ferguson, Ltd. as an operating company as of May 9, 1986?

A I would disagree with that characterization. I don't believe it was independent. I don't believe it was stand alone. I don't believe it was an operating company. I believe it was a division of Massey-Ferguson, Ltd., that was organized for the sole purpose of liquidating assets with a glimmer that if things—if things turned around, unusual things happened in the industry, that maybe it could survive, but it was a substantial gamble rather than an investment.

(defendants objections omitted from the above text) TR. 2947, line 3 - 2953, line 16. Questions by Mr. Smith, Answers by Yale Kramer.

As noted above Mr. Kramer's testimony on the corporate form MCC was persuasive and damaging to defendants' arguments. In light of his testimony the court will further address his conclusions to existing law.

As the Fifth Circuit has noted in *Jon-T Chemicals. Inc.*, 768 F.2d 686, 696 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986):

> A corporation, unlike proteus, cannot assume a new form at will. While we generally recognize a corporation's attempt to assume the guise of a subsidiary, even this expedition into fantasyland has its bounds. Here, the corporate veil with which appellants would enrobe the subsidiary to give it the semblance of being attired in corporate clothing was so diaphanous that the district court could well see through it.

The court after a review of the evidence finds that MCC was not a stand alone corporation. Project Sunshine was a brilliant financial restructuring move which undoubtedly saved Varity millions of dollars in reducing their debt and avoiding substantial heritage costs. The totality of the circumstances however reveals a corporation who but for its lifeline to M-F and Varity would not have been afloat on day one of its corporate existence. When Varity and MF cut that lifeline inevitably MCC sank. The court further finds that communications to employees of MF were laced with fraudulent misrepresentations in order to get them to sign acceptances of employment. MCC was a sham from the start. Accordingly, defendants are not able to hide behind this bankrupt shell of a company when required to make their employees whole. Defendants were the alter egos of MCC.

BREACH OF CONTRACT—COUNT 1

Discussion of plaintiffs' breach of contract claim is discussed on pages 10-17 [32a-37a], in the court's order on motions for new trail and judgment as a matter law. The court set aside the jury verdict on the breach of contract claim.

BREACH OF FIDUCIARY DUTY—COUNT 2

MF-RETIRED INDIVIDUAL PLAINTIFFS MCC-RETIRED CLASS

Plaintiffs argue in support of their claim under this theory that defendants are liable for breach of fiduciary duty pursuant to 29 U.S.C. §§ 1104 and 1132(a)(3). Plaintiffs in support of their claim argue that defendants made misleading communications to plaintiffs in violation of their fiduciary duties by assuring plaintiffs that their benefits would not be changed when they "transferred" to MCC. Defendants failed to disclose MCC's unstable financial condition and poor prospect for survival; failed to disclose the effects that MCC's probable bankruptcy, receivership or insolvency would have on the welfare benefits of MCC employees. Further, plaintiffs contend that defendants failed to inform them in *You and*

M-F, as required by ERISA, of a reserved right to amend or terminate the welfare benefits plan. As a result of these misrepresentations, plaintiffs claim that they were denied the opportunity to make informed decisions about acceptance of employment with MCC.

Defendants argue that the Eighth Circuit has held business decisions by an ERISA employer not to be governed by the fiduciary standard of 29 U.S.C. § 1104. The Court states that:

> Under the dual capacity doctrine, the [employer] can act in accordance with its interests as employer when not administering the plan or investing its assets. Business decisions can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits.

Adams v. LTV Steel Mining Co., 936 F.2d 368, 370, (8th Cir. 1991); *see also Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988) (employer's decision to terminate rather than carry employees on payroll after sale of plan so they could collect retirement benefits is employment decision "not subject to ERISA's fiduciary standard of care"). Defendants further argue that plaintiffs' breach of fiduciary duty claims are barred because they are claims for benefits, not claims brought on behalf of a plan. *See Simmons v. Southern Bell Telephone & Telegraph Co.*, 940 F.2d 614, 617 (11th Cir. 1991).

To recover on a claim for breach of fiduciary duty arising out of defendants' conduct with respect to a plan, plaintiffs are required to prove by a preponderance of the evidence:

(1) Defendants were fiduciaries with respect to the plan of which plaintiffs were participants or beneficiaries.

(2) Defendants breached their fiduciary duties.

(3) Plaintiffs' damages from the breach of the fiduciary duties.

See McNeese v. Health Plan Marketing. Inc., 647 F. Supp. 981, 983-87 (N.D. Ala. 1986).

Every plan must have at least one named fiduciary who has authority to control and manage the operation and administration of the plan. 29 U.S.C. § 1102(a)(1). In addition, under ERISA:

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). The term "fiduciary" should be broadly construed to effectuate the remedial purposes of ERISA. *See, e.g., Donovan v. Mercer*, 747 F.2d 304, 308-09 (5th Cir. 1984). The statutory definition "includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title." *Id.* at 308 (quoting H. R. Rep. No. 1280, 93rd Cong., 2d Sess., *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4639, 5038, 5103). The test is a functional one. *See, e.g., Blatt v. Marshall and Lassman*, 812 F.2d 810, 812 (2d Cir. 1987). "[F]iduciary status exists with respect to any activity enumerated in the statute over which the entity exercises discretion or control." *Id.*

Employers who sponsor the plan, the directors, officers or shareholders thereof, and plan administrators are among those parties who may be ERISA fiduciaries with respect to a plan, where they possess sufficient authority or control over the investment of plan assets or the administration of the plan. *See* R. Cooke, *ERISA Practice & Procedure* § 6.02 (1989 and 1991 Supp.); *United States Steel Corp. v. Commonwealth of Pa. Human Relations Comm'n*, 669 F.2d 124, 126-28 (3d Cir. 1982) (employer is fiduciary when it has authority to alter terms of plan and authority to administer plan); *McNeese v. Health Plan Marketing. Inc.*, 647 F. Supp. 901, 983-85 (N.D. Ala. 1986) (plan administrator who exercises discretionary

control over administration of plan is fiduciary as to matters within its control). A person is a fiduciary, however, only to the extent the person is engaged in functions which confer fiduciary status, i.e., when administrating the plan or investing its assets. *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988). Thus, an employer that is also an ERISA fiduciary is free to make its business decisions for business reasons, without regard to the collateral effect those decisions might have on contingent employee benefits. *Id.; Adams v. LTV Steel Mining Co.*, 936 F.2d 368, 370 (8th Cir. 1991).

An ERISA fiduciary's duties are statutorily prescribed:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent and to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

29 U.S.C. § 1104(a)(1). Misrepresentations or omissions in a fiduciary's communication with participants and beneficiaries regarding plan administration are breaches of the fiduciary duties recognized by ERISA. *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983). "Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in § 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)." Id.

Although business decisions made by a fiduciary in a capacity other than its capacity as fiduciary cannot themselves be a breach of fiduciary duty, such a fiduciary must make no material misrepresentations regarding administration of the plan in connection with its business decisions. *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1162-64 (6th Cir. 1988); *Payonk v. HMW Industries. Inc.*, 883 F.2d 221, 225-26- (3d Cir. 1989) (*Berlin* prohibits affirmative misrepresentations about rights under a plan affected by employer's business decisions). A fiduciary's failure to act or pay benefits in accordance with plan documents is a breach of fiduciary duty. 29 U.S.C. § 1104(a)(1)(D). A fiduciary's failure to effectuate proper disclosure of the terms of the plan in the summary plan description is a breach of fiduciary duty. *See Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1183-86 (3d Cir. 1985). A fiduciary's failure to notify participants and beneficiaries of a plan's financial problems, where they are apparent to the fiduciary, is a breach of fiduciary duty. *See, e.g., McNeese v. Health Plan Marketing. Inc.*, 647 F. Supp. 981, 985-86 (N.D. Ala. 1986) (failure to notify participants of employer's delinquent contributions to pension fund); *Chambers v. Kaleidoscope, Inc. Profit Sharing Plan and Trust*, 650 F. Supp. 359, 377 (N.D. Ga. 1986) (same). In administering a plan, a fiduciary may not favor one group of plan participants over another. *Winpisinger v. Aurora Corp. of Ill., Precision Castings Div.*, 456 F. Supp. 559, 566 (N.D. Ohio 1978).

Individual participants and beneficiaries may not invoke 29 U.S.C. § 1109, through its civil enforcement provision, 29 U.S.C. § 1132(a)(2), as a basis to recover damages they suffered as a result of a breach of fiduciary duty. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 105 S.Ct. 3085, 3089, 87 L.Ed.2d 96 (1985). This portion of ERISA only allows participants and beneficiaries, on behalf of the plan, to recover damages suffered by the plan; the recovery

goes to the plan. Nevertheless, individual participants and beneficiaries may sue under 29 U.S.C. § 1132(a)(3) for an ERISA fiduciary's violation of 29 U.S.C. § 1104, and recover their own damages. The scope of the remedy provided by 29 U.S.C. § 1132(a)(3) was an issue left open by *Russell*, 473 U.S. at 148-54, 105 S.Ct. at 3094-96 (Brennan, J., concurring); *see also Hozier v. Midwest Fasteners. Inc.*, 908 F.2d 1155, 1162 n.7 (3d Cir. 1990) (recognizing open question); *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984) (affirming award to class of participants and beneficiaries for fiduciaries' breach of 29 U.S.C. § 1104 duties).

This court concludes that ERISA provides for a cause of action by individual participants and beneficiaries who are victims of an ERISA fiduciary's breach of fiduciary duty, and allows such plaintiffs to recover their own compensatory damages. *See Bartucca v. Katy Industries. Inc.*, 668 F. Supp. 111, 112-13 (D. Conn. 1987). Recognition of such a cause of action is compelled by the plain language of 29 U.S.C. § 1132(a)(3), which authorizes an individual participant or beneficiary to bring a civil action "to enjoin *any act or practice* which violates *any provision* of this title or the terms of the plan, or . . . *to obtain other equitable relief . . . to redress such violations*." 29 U.S.C. § 1132(a)(3) (emphasis added). Violation of § 1104 is an act which violates ERISA, and the remedy allowed in § 1132(a)(3) is in addition to the remedy allowed in § 1132(a)(2). A participant or beneficiary should not be limited to proving damage to the plan in order to obtain relief to redress violations of ERISA. Indeed, in this case "the plan" has not been damaged—only individual participants and beneficiaries who were denied promised benefits have been damaged.

Recognition of such a cause of action is consistent with "black-letter trust law," as stated by Justice Brennan in *Russell. Russell*, 473 U.S. at 152-53, 105 S.Ct. at 3095-96 (Brennan, J., concurring). Trust law provides that a fiduciary owes strict duties running *directly to the trust beneficiaries. Id.*, 105 S.Ct. qt 3095 (citing Restatement (Second) of Trusts § 182 (1959); Bogert, *Law of Trusts* § 109 (1973)).

The court notes that the Eighth Circuit Court of Appeals approved a damage award to a class of individual participants and beneficiaries for plan fiduciaries' breach of duty in *Monson*, 739 F.2d 1293. In addition, at least one federal district court has allowed an individual participant or beneficiary to sue a plan fiduciary for damages sustained by the participant or beneficiary as a result of a breach of fiduciary duty under 29 U.S.C. § 1104. *See St. Mary Medical Center v. Cristiano*, 724 F. Supp. 732, 740 (C.D. Cal. 1989) (assignee of participant's rights).

Awards of money damages for past benefits lost as a result of the breach of a fiduciary duty is an appropriate remedy to redress such a breach as allowed by 29 U.S.C. § 1132 (a)(3) where the breach only damages individual participants and beneficiaries but not the plan itself. *See Warren v. Society Nat'l Bank*, 905 F.2d 975, 981-82 (6th Cir. 1990) (money damages available for violation of 29 U.S.C. § 1104), *cert. denied*, ___U.S.___, 111 S.Ct. 2256, 114 L.Ed.2d 709 (1991); *Monson v. Century Mfg. Co.*, 739 F.2d 1293 (8th Cir. 1984) (allowing money damages for violations of 29 U.S.C. § 1104); *McNeese v. Health Plan Marketing, Inc.*, 647 F. Supp. 981, 986-87 (N.D. Ala. 1986) (allowing this remedy).

Applying these standards to the present case, the court concludes based on the findings of fact that M-F was a fiduciary with respect to the M-F Plan. M-F was the administrator of the Plan and exercised discretionary authority and control with respect to every aspect of the management and administration of the Plan. Varity was a fiduciary with respect to the M-F Plan because Varity at all times controlled its alter ego, M-F. In addition, the evidence showed that Varity, by itself and through M-F, exercised discretionary authority and control respecting the management and administration of the Plan.

M-F and Varity were also fiduciaries with respect to the MCC Plan because MCC simply used the M-F Plan as its own and, on May 1, 1987, formally adopted the M-F Plan in its entirety. The evidence further showed that Varity and M-F exercised discretionary authority and control with respect to

the management and administration of the MCC Plan both directly and through their alter ego MCC.

The court concludes that defendants breached their fiduciary duties to plaintiffs in the following particulars, as further detailed in the findings of fact:

a. By failing to properly disclose the terms of the Plan in the summary plan description *You and M-F*, including in particular the failure to disclose the claimed reservation of a right to amend or terminate as set forth in § 7.4 of the Plan.

b. By making material misrepresentations and omissions to the Retired and Terminated Classes in connection with the prospective transfer of those plaintiffs' employment and benefit rights to MCC, including the misrepresentation of MCC's prospects for success and the failure to disclose its probable failure and the effect thereof on plaintiffs' benefits. These misrepresentations and omissions also prevented the Retired and Terminated Classes from electing early retirement or taking severance pay from M-F as an alternative to accepting employment with MCC.

c. By favoring other classes of employees and retirees over those of the CARE division with respect to the continuation of their rights under the Plan.

d. By failing to pay benefits according to the applicable terms of the Plan documents.

e. By attempting a facially invalid unilateral assignment of the benefit rights of the Individual Plaintiffs from the M-F Plan to the MCC Plan, including the failure to inform the Individual Plaintiffs of the purported assignment and the failure to inform them of the relevant facts concerning MCC which would have been essential to their evaluation of any such proposed assignment.

The MCC-Retired subclass as well as the Individual Plaintiffs are therefore entitled to recovery of compensatory damages for unpaid past benefits and to injunctive relief under 29 U.S.C. § 1132(a)(3).

MCC-TERMINATED CLASS[5]

Sections 3.05 and 5.01 of the Personnel Administration Manual ("PAM") Exs. 6, 7) constitute employee welfare benefit plan documents within the meaning of ERISA which governed the provision, level, extent and duration of severance benefits. Section 3.05 of the PAM provides:

> D. "*Termination - Release*" is the non-disciplinary termination by Company option or mutual agreement of an employee as the result of circumstances such as the following:
>
> 1. employee is putting forth his best effort, but cannot perform at an acceptable level in his present position;
>
> 2. employee not designated for layoff who refuses an offer of work which is considered unsuitable according to Section IV.A.4. of this procedure;
>
> 3. employee is habitually tardy or absent because of factors beyond his control;
>
> 4. employee is no longer performing at an acceptable level as a result of significant change in position requirements;
>
> 5. employee is separated as the result of the sale of a Company-operated retail store and is not reemployed by the successor store within thirty (30) days following the date of its transfer to the purchaser; or
>
> 6. other individual reasons consistent with this P.A.M. as approved by the Director Personnel - Head Office.
>
> Terminations of this type are eligible for termination allowance.

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[5] This subclass consists of persons who worked for M-F before May 9, 1986 and were terminated when MCC went into receivership on March 4, 1988.

Section 5.01 of the PAM provides:

III. *GENERAL*

A. It is the practice of the Company to provide a measure of income protection for full-time salaried employees in the event of their separation for reasons beyond their control.

1. This practice does not apply to salaried employees -

a. with less than three months' continuous service;

b. hired as Limited Service Employees (casual-temporary); or

c. hired under the Cooperative Education Student Program.

B. The publication of the practice outlining conditions for payment and the schedule of allowances does not constitute a contractual relationship with the employee. The termination allowance procedure represents present Company practice, administered at the Company's sole discretion which may be amended by the Company without prior notice.

C. Eligibility for termination allowance is based upon the separation classification as outlined in P.A.M. 3.05.01, Separations - Salaried Employees.

1. An employee will not be eligible for termination allowance if the separation is classified as any of the following:

a. "Quit"
b. "Discharge"
c. "Layoff"
d. "Retirement, Death or Disability"
e. "Termination - Unsatisfactory"
f. "Assignment Completed"

2. An employee whose separation is classified as "Termination - Release" will be eligible for termination allowance.

* * *

G. *Approval Procedure*

1. The manager of the terminated employee will initiate termination action in accordance with PAM 3.05.01, Separations - Salaried Employees. Recommendations regarding termination allowance will be noted in a separate memo. The initiating manager will make only recommendations; he or she will not calculate the actual amount of termination allowance. No commitment is to be made to the employee until notice has been received that the allowance has been authorized.

2. Upon receipt of the Employee Profile and accompanying memo, Personnel Administration Department will review the recommendations and details regarding the termination. Any termination allowance must be approved by Personnel Administration Department. Recommendations are to be based only on the reasons outlined on the Employee Profile. Therefore, it is important that concise and accurate explanations be given to the employee and be provided on the Employee Profile (Form MF-4197).

The plan language above clearly states that "an employee will not be eligible for termination allowance if the separation is classified as any of the following: quit, discharge, layoff, retirement, death or disability, termination - unsatisfactory, assignment completed". The evidence is clear, without the transfer to MCC, employment conditions at M-F for this subclass were going to change because of the large losses. Accordingly, this subclass would have been "out of work" soon in any event. Under the factors listed above this subclass of plaintiffs is unable to state a successful claim.

Based on *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 113-15 (1989), this court finds that with defendants reservation of the right to interpret this plan our standard of

review is not de novo but an arbitrary and capricious standard. When viewed as a whole, M-F's termination - severance pay plan did not create any reasonable expectations in the MCC-terminated subclass. Accordingly, recovery under the breach of fiduciary duty theory is denied for this subclass.

INTERFERENCE WITH PROTECTED RIGHTS—COUNT 5

The court addresses this count in the Court's order on defendants' motions for judgment as a matter of law and for new trial at pages 18-24 [38a-43a], where the court affirmed the jury verdict on the interference with protected rights claim as it pertains to the MCC Retired Class and the individual plaintiffs, but set aside the jury verdict on this claim that was awarded to the MCC Terminated Class.

ESTOPPEL—COUNT 4

MF-RETIRED INDIVIDUAL PLAINTIFFS

MCC-RETIRED CLASS

Under this claim plaintiffs assert that the representations set forth in Exhibits A and B establish their right to a fixed level of benefits pursuant to a theory of promissory or equitable estoppel. Plaintiffs argue that the evidence shows that defendants promised plaintiffs that welfare benefits would be unchanged when they transferred to MCC, and would remain unchanged in retirement. The plaintiffs claim that these representations were such that defendants expected or should have expected that they would induce action or forbearance by plaintiffs. In reliance on those promises, plaintiffs provided services for defendants, then retired and did not look for other employment.

Defendants rely on the Eighth Circuit's ruling in *Howe I* in which it stated after looking at the plan documents, publications and the Company's practices that no promise of lifetime benefits or benefits vested upon retirement. Therefore, the defendants argue that the key ingredient of promise is missing in the estoppel claim. Defendants further argue that ERISA does not recognize a claim for estoppel.

As the law of ERISA emerges, one fact remains constant. parties in ERISA suits will continue to dispute which common law claims have been preempted and those which have not. As Chief Judge Waters notes in *Fitch v. Arkansas Blue Cross and Blue Shield*, 795 F.Supp. 904, 906 (W.D. Ark. 1992), "in recent years the issue of whether state law principles of estoppel apply to an ERISA governed employee benefit plan has been the subject of numerous reported decisions." After a careful and through review of this case law Judge Waters concluded that an estoppel claim would be recognized by the Eighth Circuit Court of Appeals in some circumstances. In reaching his decision, Chief Judge Water states:

> It has also been noted that the language contained in 29 U.S.C. section 1132(a)(3) allowing a participant or beneficiary to bring a civil action to "obtain other appropriate equitable relief" evidences Congress's intent that federal courts fashion federal common law. *Law v. Ernst & Young*, 956 F.2d 364, 369 (1st Cir. 1992) (*citing, Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 156, 105 S.Ct. 3085, 3097, 87 L.Ed.2d 96 (1985) (Brennan, J. concurring in judgment)). Additionally, a line of case law exists that imposes liability upon reliance on misstatements or errors in the summary plan description, even when the misstatements conflict with the plan itself. *See e.g. Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988).

Fitch at 906-07.

Serious doubts have been expressed over the extension of plan eligibility through estoppel and the courts have placed various limitations on the use of these principals. *Fitch* at 907. One of the main reasons for this apprehension is the desire to protect the actuarial soundness of benefit plans. This concern is not a factor in the case at bar since the benefit plans here are self insured.(Findings of Fact number 3).

The Court of Appeals for the Eleventh Circuit has held that claimants cannot succeed on estoppel arguments based on oral modifications of employee benefit plans. *Nachwalter v. Christie*, 805 F.2d 956 (11 Cir. 1986). However, courts are

allowed to fashion a common law equitable estoppel in cases involving oral interpretations of ambiguities in such plans. *Kane v. Aetna Life Insurance*, 893 F.2d 1283, 1285-86 (11th Cir. 1990), *cert denied*, ___ U.S. ___, 111 S.Ct. 675, 112 L.Ed.2d. 668 (1991); *See also Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 820-23 (10th Cir. 1992).

The elements of federal common law estoppel are:(1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe the party asserting the estoppel would rely on it; (4) the party asserting the estoppel did not know, nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably relied on the misrepresentation. *National Companies Health Benefit Plan v. St. Joseph's Hospital*, 929 F.2d 1558, 1572 (11th Cir. 1991). *See also Heckler v. Community Health Services*, 467 U.S. 51, 59, 104 S.Ct. 2218, 2223-24, 81 L.Ed.2d 42 (1984).

After a review of the above listed factors the court finds that all factors are present. The first, defendants represented that plaintiffs' benefits would remain unchanged with MCC. (*See* exhibits A and B) Second, defendants knew that their SPD's were faulty and could represent a false impression of the benefits plan. Third, defendants wanted to paint a rosy picture of the future of MCC in order to induce plaintiffs to accept the transfer. Fourth, under ERISA an SPD must contain any termination or modification language. *You and M-F* was silent in this regard, therefore as a matter of law plaintiffs were unaware of the right to terminate, amend or modify the plan. Fifth, all plaintiffs either knowingly and willingly accepted the transfer (MCC- Retired subclass) or without their knowledge were assigned to MCC (Individual Plaintiffs).

You and M-F contained the following statements in which a reasonable M-F and MCC retiree or employee could base their understanding that their welfare benefits would continue into retirement:

> The company has a total compensation policy which keeps pace with industry and is considered to be among the best. This booklet summarizes the various life, health, and disability insurance policies and the retirement income plan for salaried employees. *These benefits represent a significant element of compensation in addition to your paycheck since they relieve you of putting aside a part of your cash income to take care of health problems and to provide for your survivors or for your own years in retirement.* (emphasis added)

Section I, p. 8.

> When you retire from the Company you take with you a number of benefits from your employment—
>
> * * *
>
> — basic health benefits
>
> — major medical benefits
>
> — dental health benefits
>
> — vision care benefits
>
> — hearing aid benefits
>
> — non-contributory life insurance, 150% of final annual rate of earnings to age 65—then $3000
>
> — life insurance from your contributory policy, if applicable

Section VIII, p. 5.

> The basic health, major medical, dental health, vision care, and hearing aid benefits for Company employees continue in retirement. About 3 months before your 65th birthday, you are expected to enroll in the Part 'B' of the social security Medicare program which provides medical insurance in addition to the hospital insurance provided under Part 'A'. At this time the Company will assume you are covered by Medicare, and the Company health benefits will take responsibility for only those covered expenses not covered by Medicare. At the same time, the Company will reimburse you, in your monthly

pension check, for the Medicare Part 'B' premium which is deducted from your monthly social security check.

It is your responsibility to inform the Company when your spouse attains age 65 and enrolls in Medicare Part 'B' in order that the Company may reimburse you for the cost of your spouse's Medicare deduction from monthly social security income. It is also your responsibility to advise the Company in the event of the death of your spouse, so that the Company's reimbursement for Medicare is adjusted.

Section VIII, pp. 7-8.

Coverage under the group benefits plan - basic health and major medical—

1. continues for employees who retire as pensioners and their dependents;

2. continues for surviving dependents of a retiree;

Section IV, pp. 12-13.

Vision Care Insurance continues for employees who retire as pensioners and for their dependents.

Section IV, p. 16.

If you work beyond your 65th birthday, your noncontributory life insurance continues in force until you retire when, effective at midnight of the last day of the month prior to the day pension begins, $3,000 remains in force for the rest of your life, payable to a beneficiary or estate.

Section II, p. 2.

Life insurance coverage in retirement continues to be paid for by the Company.

. . . .

If you enroll in the contributory life insurance plan when you are first eligible, within 31 days of hire, OR participate in it for at least 15 years before retirement, you continue to be insured in retirement at no cost to you.

In retirement before age 66, the insurance continues in force at 50% of your final annual rate of earnings and is reduced by 5% per year on your 66th, 67th, 68th, 69th, and 70th birthdays. The reduction is effective at midnight at the close of the birthday. If you retire at age 66 or later, the insurance coverage drops to the level designated by your last birthday. At age 70, then, insurance equal to 25% of your last annual rate of earnings is still in force and remains in force for the rest of your life, payable to your beneficiary or estate at time of your death.

Section II, p. 3

The dental health plan covers all full-time salaried employees, retirees, and eligible dependents.

Section V, p. 1.

In *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 984 (8th Cir. 1992) the court found that ERISA sets forth the relevant requirements for a proper summary plan description in the following terms:

Section 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries * * * The summary plan description shall include the information described in section (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan * * *

(b) The plan description and summary plan description shall contain the following information: * * * cir-

cumstances which may result in disqualification, ineligibility, or denial or loss of benefits * * *

29 U.S.C. section 1022(a)(1), (b) (1975). Pursuant to 29 U.S.C. section 1035, the Secretary of Labor is empowered to prescribe necessary regulations and forms. Pursuant to that power, regulations promulgated by the Secretary state that:

> (a) Method of presentation. The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. In fulfilling these requirements, the plan administrator shall exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan. Consideration of these factors will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross-references and a table of contents.
>
> (b) General format. The format of the summary plan description must not have the effect to misleading, misinforming, or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure, or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description, the page on which the restrictions are described is noted.

29 C.F.R. section 2520.102-2(a),(b) (1988).

The law is clear; a company that has provided welfare benefits to employees and retirees must communicate with the employees in a manner and fashion which fully and fairly apprises them of the extent and limitations of their benefits.

While a plan's summary may be easily understood, it does not fully comply with ERISA if it is not an accurate interpretation of the original pension plan. *McKnight v. Southern Life and Health Ins. Co.* 758 F.2d 1566, 1570 (11th Cir. 1985). It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document and then claim that any inconsistencies will be governed by the plan. Unfairness will flow to employees for reasonably relying on the summary booklet. *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136, (6th Cir. 1988) (quoting *McKnight v. Southern Life and Health Ins. Co.* 758 F.2d 1566, 1570 (11th Cir. 1985). *See also Hansen v. Continental Insurance Co.*, 940 F.2d 971, 982 (5th Cir. 1991); *Pierce v. Security Trust*, 979 F.2d 23 (4th Cir. 1992); *Govoni v. Bricklayers Masons & Plasterers*, 732 F.2d 250, 252 (lst Cir. 1984) (reliance or prejudice from faulty plan summary is ground for relief); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224-25 (9th Cir. 1984) (misleading summary plan description, combined with misleading management representations, preclude summary judgment in favor of employer); *Hoefel v. Atlas Tack Corp*, 581 F.2d 1, 3 (1st Cir. 1978) (enforcing summary of retirement plan) *cert. denied*, 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed.2d 462 (1979); Genter v. Acme Scale and Supply Co., 776 F.2d 1180, 1185 (3d Cir. 1985) (the summary plan description must not mislead, misinform or fail to inform participant and beneficiaries of the plan); *Hurd v. Hutnik*, 419 F.Supp 630, 656-57 (D. N.J. 1976) (despite disclaimer, summary plan statement governs).

Under ERISA, an employer must provide a summary plan description to a participant that describes circumstances which may result in disqualification, ineligibility, or denial or

loss of benefits, written in understandable form, which is sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations under the plan. *Arnold v. Arrow Transp. Co. of Delaware*, 926 F.2d 782 (9th Cir. 1990). Employees are entitled to rely on descriptions contained in summary benefits plan descriptions required by ERISA. Poor drafting of summary benefit plan description required by ERISA may extend or enlarge coverage which would otherwise be unavailable. *Branch v. G. Bernd Co.*, 764 F. Supp. 1527, 1538 (M.D. Ga. 1991).

There are other specific obligations placed on the employer by the Act. One of these obligations relates to the notification that must be afforded the plan participants of their rights under the plan. Congress felt that ERISA's predecessor legislation had failed to provide adequate notification of rights for the plan participants. The Senate report on the Act identified as a source of congressional concern the inadequacy of effective notice of the rights of the plan participants due to the technicalities and complexities of the predecessor's Act's language—language which was all too often misleading or incomprehensive. For expressions of these concerns in House and Senate reports, see H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974), reprinted in 1974 U.S.C.C.An. 4639, 4620, and S. Rep. No. 383, 93d Cong., 2d Sess. 18 (1975), reprinted in 1974 U.S.C.C.An. 4639, 4890, 4935. *Pierce v. Security Trust*, 979 F.2d 23 (4th Cir. 1992).

The law is clear, if plan administrators fail to accurately represent the terms of an ERISA plan in an SPD, the undisclosed provisions are ineffective. The Code of Federal Regulations could not make this point clearer—"Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantage and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations." 29 C.F.R. section 2520.102-2(b) (1988); *McKnight*, 758 F.2d at 1570, *Edwards*, 851 F.2d at 136.

As with other portions of this matter the parties disagree of which document or documents constituted an SPD. For example, the following is a portion of the trial transcript, in which defendants lead counsel, Mr. Kavaler explains to the court his position on SPD's:

> MR. KAVALER: . . . Your Honor, as you know, under the plans the company is both the sponsor and the plan administrator. The company characterizes documents, and if the company says it's an SPD as a matter of law, your Honor that's how ERISA works—the company is charted with the responsibility of putting out an SPD.
>
> The company could put out a piece of yellow paper on it with a picture of Mickey Mouse, and they could say, "This is the SPD." The Department of Labor could come in and say, "Well, it's deficient." That would be a different question, but if the company says it's the SPD, it's an SPD until someone determines it's not, and with all due modesty, Your Honor, in this situation I am the company. I am telling you what the company called this.

(Tr. 2433-34).

Defendants' position is further spelled out in their trial brief at page 6:

> . . . The provision of these welfare benefits was governed by the Massey-Ferguson, Inc. employee trust agreement and the Massey-Ferguson, Inc. employee benefits plan (with appendices). These two documents incorporated each other by reference, and are hereinafter referred to as the Master Plan. Notwithstanding a lot of

silliness being fostered by plaintiffs' counsel, the Master Plan (and M-F Inc.'s disclosure of its salient provisions) was in all respects legal and proper—it satisfied all the requirements of federal benefits law then in effect. That it is possible to craft a better regime is beside the point; Congress mandated no more than M-F Inc. did.

The bottom line question for the court is which document or documents constituted the SPD in effect when plaintiffs accepted the transfer to MCC. In findings of fact numbers 87-97, the court found that defendants changed the terms of their benefits plans many times. The first change occurred in December 1981, M-F amended its health benefits plan to require contributions from active employees toward the cost of health benefits, effective January 1, 1982. As stated above, this modification was communicated to employees through a December 1981 memorandum from victor Rice, a January 1982 memorandum from Byron Quandt, and a December 1981 insert for *You and M-F*. In January 1983, M-F amended its health benefits plan again. This modification was communicated to employees through a January 1983 memorandum from Gary Fryatt. Replacement or addition pages to insert in *You and M-F* were not prepared. For some reason, at this point, M-F abandoned the practice of producing and distributing replacement pages for *You and M-F*. In December 1983 M-F once again amended its health benefits plan to adopt a new Comprehensive Major Medical Plan for employees and retirees. This modification was communicated to employees and retirees through memoranda and a booklet entitled the Massey-Ferguson Inc. Comprehensive Major Medical Plan. Replacement or addition pages to insert in *You and M-F* were not prepared. As found above, defendants' intended to reissue the Comprehensive Major Medical Plan in the format of the *You and M-F* so that the employees could insert the pages in *You and M-F*. Jill Wellman, the general benefits administration manager of MCC for salaried employees, and others were working on revisions to *You and M-F* in

1984 after the Ruth memo was distributed. This planned action indicates to the court that defendants intended to supplement their chosen vehicle for benefits communication, namely amending *You and M-F*.

As found above, a reasonable person, if he or she received and read the Comprehensive Major Medical Plan, would not understand it to be a notice that defendants were reserving a right to terminate welfare benefits in retirement. Accordingly, exhibit 511, the Massey-Ferguson Inc., Comprehensive Major Medical Plan, by operation of the existing law on SPD's, fails to serve as a vehicle designed to communicate benefits changes "in a manner calculated to be understood by the average plan participant" which was "sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan." 29 C.F.R. section 2520.102-2(a) (1988). Therefore, defendants are equitably estopped from asserting section 7.4 as a bar to plaintiffs' claims.[6]

To secure relief on the basis of a faulty summary plan description the claimant must show possible prejudice flowing from the summary. *Anderson v. Alpha Portland Industries Inc.*, 836 F.2d 1512, 1520 (8th Cir. 1988) (quoting *Lee v. Union Electric Co.*, 789 F.2d 1303, 1308 (8th Cir. 1986), *cert denied*, 479 U.S. 962, 107 S.Ct. 460, 93 L.Ed.2d 406 (1986). Here the evidence is clear, plaintiffs were unaware that the company reserved the right to terminate, amend or modify the plan. The evidence at trial supports the finding that prior to accepting the transfer to MCC plaintiffs were concerned with the continuation of their benefits. With the communication of the Porter letter, the side-by-side comparisons, and reference to *You and M-F*, the reasonable plan participant relied to their detriment on the reasonable belief that their benefits could not be terminated after taking retirement from MCC. *See generally Henalein v. Informal Plan for plant Shutdown Ben. For*

[6] The court realizes that traditionally equitable estoppel is a defense, however given the emerging case law and the posture of this case the court concludes that it is appropriate to recognize equitable estoppel as an independent cause of action. *See Fitch*, 795 F.Supp. at 906-07; *Kane*, 893 F.2d at 1285-86.

Salaried Employees, 974 F.2d 393, 400-01 (3rd. Cir. 1992). As mentioned in paragraphs 58-101 and exhibits A, B, and 114.

The question for this court then follows, were the statements on the extent and coverage of benefits to be provided at MCC, found in exhibits A and B, which were presented to then MF employees to induce acceptance of their transfer to MCC, sufficient to cause reliance on the language then found in the SPD—*You and M-F*? After a careful review the court concludes they were. Further, this court must answer the question; did the reasonable expectations of the plaintiffs, when relying on exhibits A, B and 114 create a modification of the plan. After a careful review of the law on deficient SPD's the court concludes that an effectively communicated modification was *not* created. The M-F plan is still in place and providing benefits to M-F retirees. Therefore, the court finds that the defendants are equitably estopped from any right to amend or terminate the plan.

Having found plaintiffs' claim for recovery meritorious under this theory of equitable estoppel the court does not now need to address plaintiffs' claims under promissory estoppel.

MCC—TERMINATED CLASS

The estoppel claims of this subclass of plaintiffs are denied for the same reasons as set forth above in pages 60-63 [97a-100a], when the court is discussing the breach of fiduciary duty made by this subclass. (i.e. that employment conditions at MF for this subclass were going to change because large losses would have dictated that layoffs would have been forthcoming in any event.)

FRAUDULENT MISREPRESENTATION—COUNT 5

Discussion of plaintiffs' fraudulent misrepresentation claim is discussed on pages 25-27 [44a-45a], in the court's order on motions for new trail and judgment as a matter law. The court therein denied all claims advanced by the plaintiffs and set aside the jury verdict on the fraudulent misrepresentation claim.

PUNITIVE DAMAGES

The availability of punitive damages in ERISA cases bought under ERISA section 502(a)(3), 29 U.S.C. section 1132 (a)(3) is a question of great importance in this case. Both sides of this lawsuit have file extensive briefs on this issue. Both sides raised interesting and compelling arguments in support of their positions. After a review of the briefs and several rounds of oral arguments this court determined that this issue had never been ruled on *directly* by either the United States Supreme Court or the Eighth Circuit Court of Appeals. Out of an abundance of caution and a desire to see that a full record was developed in order to aid appellate review this court submitted the question of punitive damages to the jury in this matter. The jury returned a verdict awarding punitive damages on the three counts submitted to them in the amounts of $33,000,000 against Varity and $3,000,000 against MF.

Following the conclusion of the trial portion of this case and prior to the arguing of post-trial motions the Eighth Circuit Court of Appeals issued its opinion in *Novak v. Anderson corp.*, 962 F.2d 757 (8th Cir.1992). In *Novak* the court defined what the term "other appropriate equitable relief" under section 1132(a)(3) entails. The *Novak* court, after a review of the legislative history, found that "other equitable relief" was defined to include only that relief which was declaratory or injunctive or the imposition of a constructive trust.

In light of *Novak* this court must now deny plaintiffs' request for punitive damages and sustain the defendants motion to strike the award of punitive damages. If the Court of Appeals concludes that punitive damages are available under section 1132(a)(3), this court is prepared to review the advisory jury's punitive damage award in conjunction with this court's independent factual findings. Naturally, this court would revisit the parties arguments in relation to due process considerations and other related constitutional issues connected with a potential award of punitive damages.

CONCLUSION

The economy in the agricultural regions of this county in the 1980's was turbulent and difficult. Varity and Massey Ferguson were in no different a situation than any of the other agricultural equipment manufacturers experiencing tough financial constraints during this period. However, in the face of difficult financial times Varity disregarded existing law and devised a plan which dramatically cut its debt burden and heritage costs. Project Sunshine was nothing more than a brilliant manipulative effort to sever retiree welfare obligations which had become a burdensome load on a financially strapped company. Project Sunshine was a sucker punch on loyal employees who had given a lifetime of service to a company and who had been induced into believing that their benefits coverage could not be terminated once they retired. ERISA was enacted to prevent just such a maneuver as was undertaken in Project Sunshine.

THEREFORE IT IS HEREBY ORDERED that the court having found in favor of the plaintiffs' MCC-Retired subclass and the Individual Plaintiffs on their claim of equitable estoppel and breach of fiduciary duty orders that the plaintiffs shall within 20 days of the date of this order make an election of remedies. The remaining plaintiffs may either choose to accept the jury's award as set out in this court's order on motions for judgment as a matter of law and motion for new trial, or choose the relief set out below, which includes reinstatement to the M-F plan. If the MCC Retired Class and/or individual plaintiffs so elect, judgment will be entered as follows:

1. Judgment for compensatory damages is awarded and judgment to be entered against the defendants in favor of the MCC-Retired subclass in the amount of $696,195.

2. Judgment for compensatory damage (actual expenses) is awarded and judgment is to be entered against the defendants in favor of the Individual Plaintiffs in the following amounts:

Individual Plaintiffs	*Amount*
John Altomare	$ 5,000
Charles Barron	3,160
Alexander Charron	7,661
Charlotte Chiles	13,106
Anita Crowe	11,877
Ray Darr	1,700
Doris Guidicessi	8,219
Barnett Lucas	3,150
Robert Skromme	18,284
Estate of Walter Smith	10,655

3. The defendants are directed to and permanently enjoined to reinstate the members of the MCC-Retired subclass and the Individual Plaintiffs to the M-F Plan as it existed on the dates of those plaintiffs' retirement. The court will retain jurisdiction to resolve any questions concerning the terms of the plan in the context of this permanent injunction.

4. The court retains jurisdiction to determine the amount of any damages to the MCC-Retired subclass and the Individual Plaintiffs for benefits accrued but not paid between the time of trial and the date they are reinstated to the plan.

IT IS FURTHER ORDERED that all claims on behalf of the MCC Terminated subclass are denied.

MARCH 26, 1993

/s/ DONALD E. O'BRIEN
DONALD E. O'BRIEN, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2319

Submitted: October 11, 1989

Filed: February 15, 1990

Charles Howe; Robert Wells; Ralph W. Thompson; Charlotte Chiles; Patrick Mousel, On behalf of themselves and as representatives of a Class of Persons Similarly Situated,

Appellees,

—v.—

Varity Corporation and Massey-Ferguson, Inc.,

Appellants.

Appeal from the United States District Court for the Southern District of Iowa

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Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

LAY, Chief Judge.

Varity Corporation (Varity) and Massey-Ferguson, Inc. (M-F Inc.) appeal from a preliminary injunction issued by the district court requiring them to reinstate portions of a terminated employee welfare benefit plan. We reverse in part and affirm in part.

BACKGROUND

M-F Inc., which makes farm equipment, is wholly owned by Varity. M-F Inc. maintains a comprehensive health and welfare benefit plan for its employees and retirees. Section 7.4 of the "Master Plan" contains the following language:

> to amend or terminate the Plan or Trust at any time, provided no such amendment or termination shall have the effect of diverting the Trust funds to purposes other than the exclusive benefit of the Employees except as provided in Section 7.1. However, the right to amend or terminate the Plan shall not, in any way, affect an Employee's right to claim benefits, diminish, or eliminate any claims for benefits under the provisions of the Plan to which the Employee shall have become entitled prior to the exercise of the Company's right, through its Board, to terminate or amend.

In the late 1970's M-F Inc. began having financial difficulties which continued through 1986. On May 9, 1986, Varity transferred a portion of M-F Inc.'s operations to a newly-created Canadian corporation, Massey Combines Corporation (MCC). As part of this restructuring, known as "Project Sunshine," approximately 1500 employees of M-F Inc. and other Varity subsidiaries were transferred to MCC. In addition, MCC assumed the obligations of M-F Inc. and other Varity subsidiaries to provide welfare benefits to 3500-4000 retirees. Because MCC adopted M-F Inc.'s welfare plan verbatim, however, this restructuring did not immediately affect the welfare benefits of M-F Inc. employees and retirees.

MCC's financial condition quickly slid downhill. On March 4, 1988, MCC went into receivership in Canada and terminated all of its employees. MCC's receiver sent notice to all former employees, retirees, and other plan beneficiaries indicating there were no funds available to continue welfare benefits. All welfare benefits immediately ceased.

This suit was brought pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1982), by representatives of former salaried employees,

retirees, disabled employees, and eligible dependents of retirees and disabled employees of M-F Inc. who were transferred to MCC in 1986 through the Project Sunshine restructuring. Plaintiffs sought an order requiring Varity and M-F Inc. to restore benefits to retirees, disabled employees, and their survivors and eligible dependents.[1] The district court granted plaintiffs' motion for a preliminary injunction, finding that the welfare benefit plan entitled retirees to continued benefits throughout their lifetimes.[2] This interlocutory appeal followed.

DISCUSSION

A. Benefits of Retirees

The district court based its order of preliminary relief on the ground that welfare benefits vested upon retirement and could not thereafter be terminated by MCC or defendants. Since we deal here only with welfare benefits (medical, dental, disability, and life insurance), ERISA's mandatory vesting requirements relating to pension rights do not apply. 29 U.S.C. § 1051(1) (1982). The issue we confront is "simply one of contract interpretation." *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988) (quoting *Local Union No. 150-A v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985)). Welfare benefit plans may be modified or terminated absent the employer's contractual agreement to the contrary. *Anderson*, 836 F.2d at 1516-17.

[1] The court conditionally certified the class "for the narrow purpose of effectuating the preliminary injunction." In view of our reversal on the issuance of the preliminary injunction as to the conditional class as a whole, we need not pass on the propriety of the conditional certification. See part B of our discussion.

[2] The district court's analysis is contained in a 51-page Memorandum and Order adopted verbatim from a memorandum submitted by plaintiffs in support of their motion. Despite our disapproval of this judicial practice, *see Jones v. International Paper Co.*, 720 F.2d 496, 499 (8th Cir. 1983), these findings and conclusions are nevertheless formally those of the district court, and we must examine the record for support of these findings and conclusions. *Id.*

Plaintiffs argue that the contractual language contained in the plan documents constitutes a promise that welfare benefits vest for life upon an employee's retirement. The district court held that Section 7.4, which secures an employee's right to claim benefits to which the employee "shall have become entitled" prior to termination of the plan, constitutes explicit vesting language. In addition, the court found that past company practice and summary plan documents stating that welfare benefits "continue in retirement" establish retirement as a vesting point.

The district court's ruling is based on an erroneous view of the law.[3] Plaintiffs have the burden of proving vested welfare benefits. *Anderson*, 836 F.2d at 1517. In *Anderson* we held that this burden was not met by the employer's promise to provide welfare benefits "until death of retiree" where the employer had expressly reserved the right to terminate or amend the plan. *Id.* at 1518. Similarly, in *DeGeare v. Alpha Portland Indus., Inc.*, 837 F.2d 812 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 1305 (1989) we held that an employer's promise to future retirees that benefits "will continue" could not be read as a promise of vested lifetime benefits in the face of a termination clause. *Id.* at 814, 816-17.[4]

[3] We recognize that a preliminary injunction is ordinarily reviewed under an abuse of discretion standard. *Dataphase Sys. Inc. v. CL Sys. Inc.*, 640 F.2d 109, 114 & n.8 (8th Cir. 1981) (en banc). However, an appellate court reviewing the grant or denial of a preliminary injunction may also determine whether the district court based its decision on an erroneous legal premise. *Calvin Klein Cosmetics Corp. v. Lenox Laboratories, Inc.*, 815 F.2d 500, 503 (8th Cir. 1987); *O'Connor v. Peru State College*, 728 F.2d 1001, 1002 (8th Cir. 1984). We therefore may reach the legal issues at the heart of the case. *See Calvin Klein*, 815 F.2d at 504 (appellate court may review legal conclusions where it is plain that lower court's ruling is "inextricably bound up in its view of the law").

[4] The Supreme Court's remand of DeGeare was based on its decision in *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948 (1989). In *DeGeare*, we held as an initial matter that a plan fiduciary's interpretation of plan terms was entitled to deference on review. *DeGeare*, 837 F.2d at 814-15. We went on to hold, however, that "*[i]n any event*, * * * the administrator and district court *correctly construed* the plan documents

After a careful review of the plan documents, we find nothing that allows plaintiffs to escape these holdings. Section 7.4 of the plan does not itself pinpoint retirement as a vesting trigger. Section 7.4 merely protects an employee's right to claim benefits for an injury or disabling event that occurs prior to termination of the plan.[5]

As *Anderson* and *DeGeare* make clear, the mere fact that employee welfare benefits continue in retirement does not indicate that the benefits become vested for life at the moment of retirement. No inference of an intent to vest can be presumed from the fact the benefits are retirement benefits. *DeGeare*, 837 F.2d at 815; *Anderson*, 836 F.2d at 1516-17. Indeed, the benefits at issue here are "retirement benefits" in a technical sense only. Unlike pension benefits, coverage under the welfare benefit plan does not begin at an employee's retirement. Rather, as plaintiffs themselves strenuously argue, the welfare benefits simply continue when an employee retires. Nothing in the documents establishes retirement as a vesting point.

The district court's reliance on extrinsic evidence is also misplaced. The court found that in the past defendants had exempted retirees from plan changes, thereby implying that retirees' benefits were "untouchable." As a general rule, however, extrinsic evidence may not be relied upon where the documents are unambiguous on their face. *See. e.g.*, *Anderson*, 836 F.2d at 1517 ("[I]f the contract is deemed

* * *." *Id.* at 815. We then applied the contract interpretation principles established in our prior cases. *Id.* at 815-16.

Bruch's holding that the plan fiduciary is entitled to deference in construing terms only when the plan expressly reserves the right to do so did not affect the principles underlying the central part of our decision in *DeGeare*. *See Bruch*, 109 S. Ct. at 956; *see also Lakey v. Remington Arms Co.*, 874 F.2d 541, 543-44 (8th Cir. 1989) (explaining the effect of *Bruch*). Thus, we disagree with the district court's conclusion that the remand of *DeGeare* leaves this circuit's law "up in the air." The basic contract interpretation principles of *DeGeare* and *Anderson* still apply.

[5] For example, if a covered employee were to break a bone one day before the plan is terminated, that employee would be "entitled" to medical expense reimbursement for the injury.

ambiguous, *then* the court may weigh extrinsic evidence to aid in its construction.") (quoting *Dubuque Packing*, 756 F.2d at 69) (emphasis added). Moreover, it is the extrinsic evidence itself, in our view, that is ambiguous. Merely because defendants chose to exempt retirees from plan changes in the past does not mean that defendants considered themselves forever bound to do so. Plaintiffs have not argued estoppel, nor have they suggested any detrimental reliance on defendants' practices. This evidence therefore does not aid plaintiffs in meeting their burden of proof.

We hold that the district court erred in granting the preliminary injunction on the ground that the welfare plan could not be terminated as to retirees.

B. Propriety of Preliminary Injunction as to Subclasses

The district court's injunction reinstates all retirement and disability benefits as they existed immediately prior to March 4, 1988, the date MCC went into receivership. As our holding above makes clear, retirees as a general class are no longer entitled to these benefits. Varity and M-F Inc. concede, however, that Section 7.4 establishes an "entitlement" in favor of beneficiaries who became injured or disabled prior to plan termination.[6] Therefore, MCC was not at liberty to terminate payments to these persons. However, MCC is presumably without funds to pay these benefits and is not a party to this lawsuit. Thus, beneficiaries with vested rights are left to look solely to Varity and M-F Inc. for satisfaction of their claims.

This observation requires us to consider two subclasses of beneficiaries. The first subclass consists of persons who became injured or disabled (and thereby vested) prior to May

[6] Defendants concede Section 7.4 is a "pipeline" provision which protects employees and retirees against termination of benefits once they suffer an injury or illness. The plan language indicates that disabled persons fall within this group and are thus entitled to continued disability benefits if their disability occurred prior to the plan termination date. The plan makes clear that these disability benefits may be terminated only upon the employee's death, attainment of age 65, or end of disability, whichever comes first.

9, 1986, the date they were transferred to MCC. We disagree with defendants' argument that these beneficiaries must look solely to MCC for recovery. M-F Inc.'s contractual obligations to provide health and disability benefits to this group had fully ripened prior to the 1986 transfer and could not be discharged by a transfer of the obligations to MCC. It is fundamental that an assignment will not discharge the assignor's debt to a third party without the third party's consent. *E.g.*, 4 A. Corbin, *Corbin on Contracts* § 866 (1951). The record is not clear, but assuming there are members of the conditional class who became entitled to welfare benefits by reason of injury or disability before May 9, 1986, then the preliminary injunction shall continue as to these persons.

The second subclass consists of persons whose benefits became vested by reason of an injury or disability occurring *after* the 1986 transfer but *before* MCC went into receivership on March 4, 1988. Defendants appear to suggest that the transfer of these persons to MCC relieved both Varity and M-F Inc. of all continuing benefits obligations. The district court disagreed, finding defendants liable for these obligations under three alternative theories: (1) as "alter egos" of MCC; (2) as "employers" under ERISA, *see* 29 U.S.C. § 1002(5) (1982), or; (3) as plan fiduciaries, *see id.* §§ 1002(21)(A), 1109. We are convinced that resolution of these issues depends on a more fully developed record and more carefully-considered factual findings than those before us. We do not accept the district court's adoption of plaintiffs' proposed findings as a final determination of the factual issues involved under these theories. Such "mechanically adopted" findings "do not reveal the discerning line for decision" on the factual issues establishing defendants' liability. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964).

Nevertheless, we find reasonable probability that the members of this subclass may be able to prove defendants liable under one or more of these theories. At the present time, we are satisfied that the district court did not abuse its equitable powers in granting this aspect of the preliminary injunction on the proposed findings it adopted. However, the district

court must now independently determine whether the record supports defendants' liability as to those persons who became entitled to benefits between May 9, 1986, and March 4, 1988.

Although the record is not completely clear on the issue, it appears that the named plaintiffs in this case do not fall within the two subclasses we have discussed.[7] However, the record does disclose the existence of some unnamed members of the conditional class who may fall within these groups.[8] Class representatives must have a personal stake in the outcome of the case at the time the district court rules on class certification in order to prevent mootness of the action. *E.g.*, *Inmates of Lincoln Intake & Detention Facility v. Boosalis*, 705 F.2d 1021, 1023 (8th Cir. 1983). In addition, plaintiffs purporting to represent a class must satisfy the requirements of Federal Rule of Civil Procedure 23. Because the named plaintiffs in this case sought relief on their claim that welfare benefits were vested as to all retirees, the district court conditionally certified a broad class for purposes of preliminary relief. In light of our ruling today, the class conditionally certified by the district court is too broad and cannot serve as the class for purposes of final judgment. The district court must now reevaluate the case under Rule 23 and redefine the class in accordance with this opinion. This may require substitution of suitable class representatives. *Cf. Kremens v. Bartley*, 431 U.S. 119, 134-35 (1977) (remanding for reconsideration of class definition and substitution of class representatives where named plaintiffs' claims have become moot).

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[7] Affidavits in the record indicate plaintiffs Howe, Thompson, Chiles, and Mousel did not suffer disability or uncompensated injury prior to March 4, 1988. The record before us is devoid of information concerning the remaining named plaintiff, Robert Wells.

[8] Affidavits in the record indicate that Harold Lynam suffered a disabling heart attack while working for M-F Inc. in April, 1986; that Roy Mahon had his leg amputated and suffered aneurysms in January, 1988.

CONCLUSION

We reverse the grant of the preliminary injunction as to the general class of persons conditionally certified by the district court. We affirm the district court's issuance of the preliminary injunction as to plan beneficiaries who are members of the class conditionally certified by the district court and who became disabled or otherwise entitled to benefit payments prior to the March 4, 1988.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2056/2111SIDM

Charles Howe, *et al*, *Appellees*,

—v.—

Varity Corporation, *et al*,

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Bowman and Judge Hansen would grant the petition. The petition for rehearing by the panel is also denied.

December 5, 1994

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit

ERISA §§ 3(1), (2)(A), (21)(A), 29 U.S.C. §§ 1002(1), (2)(A), (21)(A) (1988)

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

* * *

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

* * *

(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. . . .

ERISA §§ 101(a), (b), 29 U.S.C. §§ 1021(a), (b) (1988 & Supp. V 1993)

(a) Summary plan description and information to be furnished to participants and beneficiaries.

The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan -

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in sections 1024(b)(3) and 1025(a) and (c) of this title.

(b) Plan description, modifications and changes, and reports to be filed with Secretary of Labor

The administrator shall, in accordance with section 1024(a) of this title, file with the Secretary—

(1) the summary plan description described in section 1022(a)(1) of this title;

(2) a plan description containing the matter required in section 1022(b) of this title;

(3) modifications and changes referred to in section 1022(a)(2) of this title;

(4) the annual report containing the information required by section 1023 of this title; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1) (1988)

(a) (1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

ERISA §§ 103(a)(1), (b), (c), 29 U.S.C. §§ 1023(a)(1), (b), (c) (1988)

(a) Publication and filing [of annual reports]

(1) (A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 1024(a) of this title, and shall be made available and furnished to participants in accordance with section 1024(b) of this title.

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

* * *

(b) Financial Statement

An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan; a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning

whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of the plan.

* * *

(3) With respect to all employee benefit plans, the statement required under paragraph (1) or (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

(B) a statement of receipts and disbursements during the preceeding twelve-month period aggregated by general sources and applications;

(C) a schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction (including a notation as to whether such party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) a schedule of each transaction involving a person known to be party in interest, the identity of such party in interest and his relationship or that of any other party in interest to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction;

(E) a schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectable and the following information with respect to each loan on such sched-

ule (including a notation as to whether parties involved are known to be parties in interest): the original principal amount of the loan, the amount of principal and interest received during the reporting year, the unpaid balance, the identity and address of the obligor, a detailed description of the loan (including date of making and maturity, interest rate, the type and value of collateral, and other material terms), the amount of principal and interest overdue (if any) and an explanation thereof;

(F) a list of all leases which were in default or were classified during the year as uncollectable; and the following information with respect to each lease on such schedule (including a notation as to whether parties involved are known to be parties in interst): the type of property leased (and, in the case of fixed assets such as land, buildings, leasehold, and so forth, the location of the property), the identity of the lessor or lessee from or to whom the plan is leasing, the relationship of such lessors and lessees, if any, to the plan, the employer, employee organization, or any other party in interest, the terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options; the date the leased property was purchased and its cost, the date the property was leased and its approximate value at such date, the gross rental receipts during the reporting period, expenses paid for the leased property during the reporting period, the net receipts from the lease, the amounts in arrears, and a statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) if some or all of the assets of a plan or plans are held in a common or collective trust maintained by a bank or similar institution or in a separate account maintained by an insurance carrier or a separate trust maintained by a bank as trustee, the report shall include the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or a separate trust,

such other information as is required by the administrator in order to comply with this subsection; and

(H) a schedule of each reportable transaction, the name of each party to the transaction (except that, in the case of an acquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold) and a description of each asset to which the transaction applies; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction. For purposes of the preceding sentence, the term "reportable transaction" means a transaction to which the plan is a party if such transaction is—

(i) a transaction involving an amount in excess of 3 percent of the current value of the assets of the plan;

(ii) any transaction (other than a transaction respecting a security) which is part of a series of transactions with or in conjunction with a person in a plan year, if the aggregate amount of such transactions exceeds 3 percent of the current value of the assets of the plan;

(iii) a transaction which is part of a series of transactions respecting one or more securities of the same issuer, if the aggregate amount of such transactions in the plan year exceeds 3 percent of the current value of the assets of the plan; or

(iv) a transaction with or in conjunction with a person respecting a security, if any other transaction with or in conjunction with such person in the plan year respecting a security is required to be reported by reason of clause (i).

(4) The Secretary may, by regulation, relieve any plan from filing a copy of a statement of assets and liabilities (or other

information) described in paragraph (3)(G) if such statement and other information is filed with the Secretary by the bank or insurance carrier which maintains the common or collective trust or separate account.

(c) Information to be furnished by administrator

The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

(2) The name and address of each fiduciary.

(3) Except in the case of a person whose compensation is minimal (determined under regulations of the Secretary) and who performs solely ministerial duties (determined under such regulations), the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.

(4) An explanation of the reason for any change in appointment of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian.

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1) (1988 & Supp. V 1993)

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

ERISA § 105, 29 U.S.C. § 1025 (1988 & Supp. V 1993)

(a) Statement furnished by administrator to participants and beneficiaries

Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

(b) One-per-year limit on reports

In no case shall a participant or beneficiary be entitled under this section to receive more than one report described in subsection (a) of this section during any one 12-month period.

(c) Individual statement furnished by administrator to participants setting forth information in administrator's Internal Revenue registration statement

Each administrator required to register under section 6057 of Title 26 shall, before the expiration of the time prescribed for such registration, furnish to each participant described in subsection (a)(2)(C) of such section, an individual statement setting forth the information with respect to such participant required to be contained in the registration statement required by section 6057(a)(2) of Title 26. Such statement shall also include a notice to the participant of any benefits which are forfeitable if the participant dies before a certain date.

(d) Plans to which more than one unaffiliated employer is required to contribute; regulations

Subsection (a) of this section shall apply to a plan to which more than one unaffiliated employer is required to contribute only to the extent provided in regulations prescribed by the Secretary in coordination with the Secretary of the Treasury.

ERISA § 201(1), 29 U.S.C. § 1051(1) (1988)

§ 1051. Coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than—

(1) an employee welfare benefit plan . . . .

ERISA § 203(a), 29 U.S.C. § 1053(a) (1988 & Supp. V 1993)

§ 1053. Minimum vesting standards

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service:	The nonforfeitable percentage is:
3	20
4	40
5	60
6	80
7 or more	100

(C) A plan satisfies the requirements of this subparagraph if—

(i) the plan is a multiemployer plan (within the meaning of section 3(37)), and

(ii) under the plan—

(I) an employee who is covered pursuant to a collective bargaining agreement described in section 1002(37)(A)(ii) of this title and who has completed at least 10 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions, and

(II) the requirements of subparagraph (A) or (B) are met with respect to employees not described in subclause (I).

(3) (A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of the title).

(B) A right to an accrued benefit from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph,

including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(C)(8) of this title.

(D) **(i)** A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). The plan provision required under this clause may provide that such repayment must be made (I) in the case of a withdrawal on account of separation from service, before the earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (II) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross reference

For nonforfeitability where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 1056(c) of this title.

(E) **(i)** A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

(ii) A participant's right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because—

(I) the plan is amended to reduce benefits under section 1425 or 1441 of this title, or

(II) benefit payments under the plan may be suspended under section 1426 or 1441 of this title.

(F) A matching contribution (within the meaning of section 401(m) of Title 26) shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is treated as an excess contribution under section 401(k)(8)(B) of Title 26, an excess deferral under section 402(g)(2)(A) of Title 26, or an excess aggregate contribution under section 401(m)(6)(B) of Title 26.

ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (1988)

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

ERISA § 404, 29 U.S.C. § 1104 (1988 & Supp. V 1993)

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement—

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement—

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection—

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

ERISA § 409, 29 U.S.C. § 1109 (1988)

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

ERISA §§ 502(a), 29 U.S.C. § 1132(a) (1988 & Supp. V 1993), as amended

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section;

(7) by a State of enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

[1]*

MASSEY-FERGUSON INC.
COMPREHENSIVE MAJOR MEDICAL PLAN

NOTE: THIS IS A SUMMARY OF THE PLAN. IF THERE ARE DISCREPANCIES BETWEEN THE SUMMARY AND THE PLAN DOCUMENT, THE PLAN DOCUMENT WILL PREVAIL.

* Bracketed numbers indicate beginning of page in original document.

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COMPREHENSIVE MEDICAL PLAN
SCHEDULE OF BENEFITS

Effective Date: January 1, 1984

Eligible Class: All U.S. Salaried-Non-Bargaining Employees; U.S. Salaried Perkins Engines - Non-Bargaining Employees; and U.S. Salaried Pensioners, Survivors and LTD claimants - Non-Bargaining.

Waiting Period: 31 days continuous active service, for new hires and rehires.

Spouse: For purposes of this plan—wife or husband while not divorced or legally separated from you.

Dependent Children: Age Limit—end of calendar year in which the dependent attains age 25. Coverage for permanently disabled unmarried children continues.

COVERED BENEFITS

Cash Deductible:

Individual	\$100 per Calendar Year
Family	\$200 per Calendar Year

All covered family members may contribute to the family deductible.

Coinsurance: 80% of eligible covered expenses with the exception of those outlined below.

Out-Of-Pocket Maximum:

Individual	\$1,000 per Calendar Year
Family	\$2,000 per Calendar Year

All covered family members may contribute to the out-of-pocket deductible.

(Note: Coinsurance related to treatment received for nervous and mental disorders alcoholism and drug abuse and any expenses incurred following expiration of the duration limits shown on Page 2 are not applied to the out-of-pocket maximum.)

Aggregate Lifetime Maximum: \$250,000.00 per covered individual with restoration of up to \$1,000.00 per calendar year.

Covered Expenses Paid at 100%:
- •Emergency Care for Accidental Injury or Life Threatening Illness
- •Second Surgical Opinion Only (Deductible Waived)—Mandatory for Listed Procedures
- •Outpatient and Ambulatory Surgery (Charges for Approved Facility Only)—Mandatory for Listed Procedures
- •Pre-Admission Testing
- •Extended Care Facility
- •Home Health Care
- •PAID Prescription Drug Coverage (\$2.00 Deductible)
- •Hearing Aid Benefit (Deductible Waived)

[4] 2

SCHEDULE OF BENEFITS—Continued

LIMITATIONS AND EXCEPTIONS

Maximum Daily Private or Semi-Private Room and Board Rate will be considered at 100% of the hospital's charge for the highest priced semi-private accommodations subject to deductible and coinsurance. In other accommodations—will be considered at 100% of the full charge made subject to deductible and coinsurance.

Nervous and Mental Disorder and Alcohol and Drug Abuse Limits—

Coinsurance—Outpatient	50%
—Inpatient	80%
Lifetime Maximum	$25,000

Second Surgical Opinion—If a second opinion is not obtained on Listed Procedures, the Plan will only pay 65% of the covered surgical fee.

Outpatient and Ambulatory Facility—If a listed Procedure is performed on an inpatient basis, room and board expenses will not be paid, unless confinement is for an emergency or is medically necessary.

Duration Limits—

Inpatient Nervous and Mental Disorder/ Alcoholism and Drug Abuse	90 Days per Calendar Year
Outpatient Nervous and Mental Disorder/ Alcoholism and Drug Abuse	50 Visits per Calendar Year
Extended Care Facility	120 Days per Period of Confinement or Calendar Year
Home Health Care	60 Visits at 4 Hours per Visit

Room and Board Charge for Weekend Admission (Friday afternoon through Sunday morning) for elective and/or non-emergency surgery will not be paid.

Hearing Aid Benefit

Audiometric Examination	$30.00
Hearing Aid Evaluation Test	$30.00
Hearing Aid, Including Mold	$275.00

(Note: Benefits are available for each subsequent hearing aid once every three years.)

THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES OF COVERED INDIVIDUALS AT ANY TIME.

No. 94-1471 (2)

In The

Supreme Court of the United States

October Term, 1994

VARITY CORPORATION,

Petitioner,

v.

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

BRIEF IN OPPOSITION

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April 4, 1995

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QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act ("ERISA") § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), permit individual ERISA plan participants and beneficiaries to recover on their own behalf for breaches of fiduciary duty under ERISA?

2. Does ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 and Supp. 1993), impose a duty upon plan fiduciaries not to make affirmative misrepresentations to plan participants and beneficiaries?

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

To the Honorable Supreme Court:

The Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari submitted by petitioner Varity Corporation.

STATEMENT OF THE CASE

This case arises from a fraudulent scheme ironically named "Project Sunshine" which was designed, in part, to rid petitioner of the obligation to pay benefits to retirees and employees of Massey Ferguson, Inc. ("MF"). (5a) As a part of the scheme, and in order to induce respondents to cooperate, petitioner[1] acting in its fiduciary capacity made various material misrepresentations to respondents[2] relating to their employee benefits. Respondents relied upon petitioner's material misrepresentations and, as a result, lost their benefits. (4a-5a)

The purpose of this action was to seek restoration of the benefits lost through Project Sunshine. The district court ultimately entered judgment for respondents directing that benefits be restored on three independent grounds of recovery under ERISA: breach of fiduciary duty, interference with protected rights and estoppel. The court of appeals affirmed, with some modification of the

[1] Defendants in the proceedings below were petitioner Varity Corporation and its subsidiary, MF. The fraudulent scheme known as Project Sunshine related to the creation by Varity and MF of a new entity known as Massey Combines Corporation ("MCC"). The district court found that "MCC was a sham from the start" and that Varity and MF were the alter egos of MCC. (80a-89a) The district court found, and the court of appeals affirmed, that both defendants were liable for the material misrepresentations made to employees and retirees of MF. (4a-5a) Because MF has evidently now been merged into Varity, references to "petitioner" throughout this brief are intended to refer to both of the defendants in the proceedings below.

[2] The misrepresentations were made to all but ten of the respondents; those ten individuals recovered on a different theory. *See* note 5, *infra*.

remedy. In so doing, the court addressed only the theory of breach of fiduciary duty, and found it unnecessary to discuss the alternative bases of relief. (17a-18a, n. 5)

Although this case was originally tried to a jury, the district court entered its own findings of fact and conclusions of law. The court of appeals characterized the findings and conclusions as "painstaking and comprehensive." (7a) Petitioner does not contend that any of the district court's findings of fact are clearly erroneous. Accordingly, as the court of appeals noted (2a), it is appropriate to use those findings as a predicate for these proceedings.

The findings are set forth at pages 50a-80a of the appendix and need not be repeated in detail here. Contrary to the implication of petitioner's statement of the case, however, the district court found and the court of appeals affirmed that petitioner – acting in its fiduciary capacity – had not only failed to disclose to respondents material facts relating to their employee benefits, but had made affirmative misrepresentations upon which respondents relied to their detriment. (4a-5a; 62a-65a)

The district court also found, and the court of appeals affirmed (16a-17a), that petitioner's conduct in designing and implementing its fraudulent scheme:

> was willful, wanton, malicious, and in bad faith vis-a-vis all plaintiffs.
>
> * * *
>
> Project Sunshine was nothing more than a brilliant manipulative effort to sever retiree welfare obligations which had become a burdensome load on a financially strapped company. Project Sunshine was a sucker punch on loyal

employees who had given a lifetime of service to a company . . . . ERISA was enacted to prevent just such a maneuver as was undertaken in Project Sunshine.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' HOLDING THAT RESPONDENTS CAN OBTAIN INDIVIDUAL RECOVERY FOR BREACH OF FIDUCIARY DUTY DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT, AND IS THE PROPER RULING ON THE MERITS OF THAT ISSUE.

Petitioner's argument that the writ should be granted in this case is heavily founded on its contention that the decision below, holding that respondents can obtain individual recovery under ERISA § 502(a)(3) (29 U.S.C. § 1132(a)(3)) for breach of fiduciary duty, conflicts with the decisions of this Court in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), and *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993). However, neither *Russell* nor *Mertens* addressed the issue which was before the court of appeals.

Russell held that recovery under ERISA §§ 409 and 502(a)(2) (29 U.S.C. §§ 1109 and 1132(a)(2)) may inure only to the benefit of the plan itself and not to the benefit of individual participants or beneficiaries. The plaintiffs in *Russell* expressly disclaimed reliance on the statute respondents relied on here – ERISA § 502(a)(3) – and the Russell court did not address the question presented in this case.

Mertens addressed only the question of the form of relief available under § 502(a)(3) – a question petitioner does not raise in its petition here – and, like *Russell*, did not address the issue of individual recovery for breach of fiduciary duty. In short, there simply is no merit to petitioner's argument that the decision below conflicts with the holdings of *Russell*, *Mertens* or any other decision of this Court.

Although there may not be complete uniformity among the circuits, the Eighth Circuit's decision is in accord with most of the circuits which have addressed the issue presented in this case. Petitioner correctly identifies the Third and Seventh Circuits as also having expressly held that there is an individual right of recovery for breach of fiduciary duty under § 502(a)(3). *See Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 992-93 (7th Cir. 1993); *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1298-99 (3d Cir. 1993). In addition, decisions from both the Sixth Circuit and the D.C. Circuit have implicitly recognized an individual right of recovery. *See Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991);[3] *Eddy v. Colonial Life Insurance Co.*, 919 F.2d 747 (D.C. Cir. 1990).

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[3] In *Tregoning v. American Community Mutual Insurance Co.*, 12 F.3d 79 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1832 (1994), and *Tassinare v. American National Insurance Co.*, 32 F.3d 220 (6th Cir. 1994), the Sixth Circuit indicated that no individual right of recovery for breach of fiduciary duty would be recognized. In both cases, however, the court (like this Court in *Russell*) addressed only a claim under ERISA § 409 (29 U.S.C. § 1109) and not a claim under § 502(a)(3) and § 404.

Petitioner claims support for its position in the Eleventh Circuit's opinion in *Simmons v. Southern Bell Telephone and Telegraph Co.*, 940 F.2d 614 (11th Cir. 1991). That case, however, held only that no individual right of recovery for breach of fiduciary duty exists under ERISA § 502(a)(1)(b) (29 U.S.C. § 1132(a)(1)(b)). The *Simmons* court did not address the question of whether an individual may recover under § 502(a)(3) for a violation of ERISA § 404 (29 U.S.C. § 1104).

Among the courts of appeals which have directly addressed the question, only the Ninth Circuit has held that no right of individual recovery exists under § 502(a)(3).

Contrary to petitioner's argument, it was not necessary for the courts which have recognized a right of individual recovery under § 502(a)(3) to infer or read into the statute any remedy not expressly stated. Those courts have merely engaged in a straightforward and literal reading of the law. ERISA § 502(a)(3) provides, in pertinent part, that an individual beneficiary may bring an action thereunder "to enjoin any act or practice which violates this subchapter . . . or to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of this subchapter." The provision of ERISA which imposes specified duties upon plan fiduciaries (ERISA § 404) is a part of subchapter I of ERISA, to which § 502(a)(3) refers. Respondents here sought only to obtain appropriate relief for a violation of ERISA § 404. As the court of appeals noted, "the plain language of the statute certainly favors" the recognition of such a cause of action for individual recovery. (14a-15a)

This Court has repeatedly noted that ERISA incorporates a carefully crafted scheme of remedies. *See, e.g., Russell, supra,* 473 U.S. at 146-47. Just as a court should be chary of reading into the statutory enforcement scheme remedies not expressly provided for, *id.*, so also should it take care not to read out of the enforcement scheme a cause of action which is evident from the plain language of the statute.

The decision below reflected the proper respect for the carefully crafted enforcement mechanisms of ERISA, and represents the proper resolution of the issue at hand. The issuance of the writ to address this issue is therefore unwarranted.

II.

THE DECISION BELOW, IN RECOGNIZING A FIDUCIARY DUTY NOT TO MAKE MATERIAL MISREPRESENTATIONS, DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS OR OF THIS COURT.

Petitioner's second argument in favor of the writ is that the decision below imposes "new" duties upon ERISA fiduciaries,[4] and in so doing conflicts with the decisions of other courts of appeals and of this Court. This contention is wrong on all counts.

---

[4] Petitioner has not challenged the finding that it was a fiduciary to the MF plan (78a-79a) either in the proceedings below or in its petition here. Petitioner's challenge relates instead only to the finding that it was acting in its fiduciary capacity when it made the misrepresentations in question.

It must be noted at the outset that petitioner has taken great care to characterize this case as one involving only the failure to disclose material facts; however, as noted above, this case involves not merely a failure to disclose but the making of affirmative material misrepresentations. The decisions of the various courts of appeals now appear to be uniform even as to the existence of a duty to disclose, but they are even more clearly in harmony as to the existence of a duty not to make affirmative material misrepresentations.[5]

---

[5] Petitioner's argument implies that all respondents relied on the same misrepresentation theory as the basis of their recovery for breach of fiduciary duty. In fact, there is a group of ten individual respondents which relied upon a different theory. These ten had retired from MF before MCC was created. While petitioner made various misleading communications to the other respondents in order to induce their consent to the transfer of their employment and benefit rights to MCC, no such representations were made to the ten individual respondents. Rather, petitioner unilaterally purported to assign to MCC its obligation to pay benefits to the individual respondents. The individual respondents were not aware of this purported assignment until MCC went into receivership and they stopped receiving benefits. (17a; 65a) The court of appeals affirmed the breach of fiduciary duty recovery for the individual respondents on the ground that an obligor "cannot free itself of contractually created duties without the consent of the persons to whom it is obligated." (17a) The court found that petitioner's failure to inform the ten individual respondents of their "transfer" to MCC or to obtain their consent constituted "a complete disregard of the rights and interests" of the individual respondents and "a clear breach of fiduciary duty in violation of section 1104(a)(1)." *Id.* The question presented by petitioner with respect to the misrepresentation theory of breach of fiduciary duty thus has no bearing on the theory of breach of fiduciary duty on which the ten individual respondents recovered.

Petitioner correctly identifies the First, Second, Sixth and D.C. Circuits – in addition to the Eighth Circuit – as having held that it is a breach of fiduciary duty under ERISA to mislead beneficiaries about their benefits or impending actions which may affect their benefits. *See Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988); *Eddy v. Colonial Life Insurance Co.*, 919 F.2d 747 (D.C. Cir. 1990); *Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994); *Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994). In addition, the Eleventh Circuit has so held. *See Local Union 2134, United Mine Workers of America v. Powhatan Fuel, Inc.*, 828 F.2d 710, 713 (11th Cir. 1987); *cf. Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991).

Petitioner's contention that a contrary rule prevails in the Third, Fifth, Seventh and Ninth Circuits is in error.

In *Blaw Knox Retirement Income Plan v. White Consolidated Industries, Inc.*, 998 F.2d 1185 (3d Cir. 1993), the Court of Appeals for the Third Circuit held that the defendant, which acted in the dual capacity of employer and plan fiduciary, did not violate its fiduciary duties in connection with the decision to sell unprofitable subsidiaries. However, *Blaw Knox*, unlike the present case and the other authorities cited above, is not a "misleading communication" case at all; the plaintiffs in *Blaw Knox* sought to predicate liability on the underlying business decision itself, not on misleading fiduciary communications regarding its effects on employee benefits.

Much more on point are the Third Circuit's decisions in *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993), and *Bixler v. Central*

Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292 (3d Cir. 1993). In *Fischer*, the court expressly held that a fiduciary has a duty not to make affirmative misrepresentations. 994 F.2d at 134-35 ("Put simply, when a plan administrator speaks, it must speak truthfully"). In *Bixler*, the court went further and held that a fiduciary is "under a duty to communicate to the beneficiary material facts affecting the interests of the beneficiary," which entails "not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." 12 F.3d at 1300. The prevailing rule in the Third Circuit is, therefore, not in conflict but in accord with the holding of the decision below with regard to the existence of a fiduciary duty not to mislead.

Petitioner also contends that *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988), reflects a rule in the Seventh Circuit in conflict with the decision below. The court in *Young* held that the employer/fiduciary did not breach a fiduciary duty by failing to reveal to its employees its intention to create a special severance plan. 849 F.2d at 1045. However, *Young* appears to be an isolated aberration relative to Seventh Circuit authority handed down both before and after it was decided.

In *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Insurance Co.*, 698 F.2d 320 (7th Cir. 1983), the plaintiffs sought to recover for breach of fiduciary duty by an insurance company which allegedly made material misrepresentations and omissions regarding annuity contracts it sold to, and administered for, an ERISA plan. The court stated that "there is little doubt that if Penn Mutual

was a fiduciary, the alleged misrepresentations and omissions were breaches of its fiduciary obligations. Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)." 698 F.2d at 326.

More recently, in *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986 (7th Cir. 1993), the court expressly held that "fiduciaries breach their duties of loyalty and care if they mislead plan participants or misrepresent the terms or administration of a plan"; that "fiduciaries must also communicate material facts affecting the interests of beneficiaries"; and that "this duty exists when a beneficiary asks for information, and even when he or she does not." 3 F.3d at 991. The *Young* decision notwithstanding, the prevailing rule in the Seventh Circuit is also in accord with the rule applied in the decision below.

The other decisions which petitioner cites as conflicting authority from two other circuits are plainly distinguishable. In *Lea v. Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990), the plaintiffs alleged that their former employer and their union breached fiduciary duties under ERISA in connection with negotiations to terminate an ERISA plan. It is not clear from the opinion whether the plaintiffs' breach of fiduciary duty claim was based on misleading communications, as such. In any event, the district court granted summary judgment on the fiduciary duty claim based on a finding that neither the employer nor the union were acting as fiduciaries during the negotiations. The Court of Appeals for the Ninth Circuit affirmed the grant of summary judgment on the same basis without ever reaching the question of the

nature and extent of the duties of an ERISA fiduciary. Thus, the Ninth Circuit has simply not spoken to the issue at hand.

In *Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), employees of a merged corporation alleged, *inter alia*, that the corporation breached its duty of loyalty under ERISA § 404(a) by making misrepresentations about how assets of the pension plans of the merging corporations would be handled if the two plans were combined. The district court rejected the breach of fiduciary duty claim, holding that it "did not arise out of an ERISA plan" because the representations in question did not purport to constitute part of the written plan itself or a plan amendment. 36 F.3d at 1323. The Court of Appeals for the Fifth Circuit affirmed on that basis, again without directly addressing the question of the nature and extent of an ERISA fiduciary's duties. In addition, the court noted that the district court found – and the plaintiffs did not dispute – that the plaintiffs had failed to establish detrimental reliance on the alleged representations in any event. Thus, the *Borst* decision also does not constitute authority in direct conflict with the decision below.

The decisions reviewed above demonstrate that, in point of fact, the prevailing rule in each circuit which has directly addressed the question is that the fiduciary duties imposed by ERISA include a duty not to provide misleading information to plan participants. Under all of those authorities, when a fiduciary elects to communicate information to beneficiaries – whether or not it is obligated to communicate in the first instance – it must communicate complete and accurate material information.

The source of this duty within ERISA is not some "vague policy concern" as petitioner contends, but rather the plain language of ERISA § 404(a)(1) (29 U.S.C. § 1104(a)(1)). The statute provides, in pertinent part, that "a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries" and shall do so "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." These duties of loyalty and prudence are perhaps the most fundamental obligations a fiduciary may possess in any context.

Petitioner's suggestion that the recognition of an ERISA fiduciary's duty not to lie to plan participants is inconsistent with the decisions of this Court is remarkable for two reasons. First, *Russell* and *Mertens* – the two decisions to which petitioner refers – again simply do not address the question at hand. Second, if as petitioner suggests *Russell* and *Mertens* generally stand for the proposition that in addressing issues of fiduciary duty and liability under ERISA, "courts are strictly limited to enforcing what the text of ERISA *says*" (petition at p. 19), respondents cannot imagine what would represent a more straightforward and strict enforcement of the provision imposing the duties of loyalty and prudence than one which holds that a fiduciary cannot lie to plan beneficiaries. The district court found, the court of appeals affirmed, and petitioner has not disputed on appeal, that this is exactly what petitioner did in the present case. Accordingly, this issue in no respect warrants the granting of the writ.

III.

THE JUDGMENT IS SUPPORTED ON GROUNDS INDEPENDENT OF THE ISSUES RAISED BY THE PETITION.

The court of appeals found it unnecessary to address the theories of interference with protected rights and estoppel, which were independent grounds for the judgment. (17a-18a, n. 5) The district court's entry of judgment on these theories was, however, proper under the facts as found by the district court (which were not challenged on appeal) and the applicable law. The factual and legal bases for the entry of judgment on the theories of interference with protected rights and estoppel are set forth at pp. 38a-41a and 100a-112a of the appendix and will not be restated here.

The issuance of the writ is unwarranted because, even if any of petitioner's arguments with respect to the breach of fiduciary duty theory had merit, the judgment would nevertheless be sustainable on the independent theories of interference with protected rights and estoppel.

CONCLUSION

The decision below does not conflict with any decision of this Court. It does not present any genuine conflict among the circuits on any issue warranting review by this Court, and it represents a proper resolution of the issues presented with appropriate obedience to the language and purpose of ERISA. For all of the foregoing

reasons, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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No. 94-1471

(14)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONER

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April 10, 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

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VARITY CORPORATION,

Petitioner,

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONER

1. Respondents concede that there is a split in the circuits on the first question presented by the Petition. The Ninth Circuit, they agree, has taken a position flatly at odds with that of the Eighth Circuit in this case. (Opp. 6)[1] Respondents argue only that the division in the circuits is not as substantial as Varity maintains and that the decision below does not directly

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1 Citations herein to the Petition are in the form "Pet. __"; citations to respondents' Brief in Opposition are in the form "Opp. __".

conflict with *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985) or *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063 (1993).

As to the latter issue, the Petition does not assert that the decision below directly conflicts with the holdings of either *Russell* or *Mertens*. The reasoning of both rulings, however, leads directly to a reading of § 502(a)(3) that does not permit individual ERISA plan participants to sue on their own behalves for alleged breaches of fiduciary duties. (Pet. 9-13) That, after all, is why Justice Brennan's concurrence *in Russell* was written—to express concern that the Court's legal analysis in that case—analysis that Justice Brennan believed contained conclusions that were "both unnecessary and to some extent completely erroneous"—might be read as barring a private cause of action under § 502(a)(3). *Russell*, 473 U.S. at 155 (Brennan, J., concurring).

That is the very question raised by this case. The Ninth and Eleventh Circuits have followed the approach taken by the *Russell* majority and *Mertens*. (Pet. 14-15) The Third, Seventh and now the Eighth Circuits have ignored completely the analysis of those cases and instead have chosen to follow Justice Brennan's concurrence, rendering both § 502(a)(2) and *Russell* itself all but superfluous. (Pet. 13, 15).

Respondents seek to minimize the magnitude of the split in the circuits by arguing that *Simmons* v. *Southern Bell Telephone and Telegraph Co.*, 940 F.2d 614 (11th Cir. 1991), held only that there can be no individual claim for breach of fiduciary duty under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1988). Respondents miss the point. In *Simmons*, the court observed that "§ 1109 [ERISA § 409] provides the sole basis for a suit alleging breach of fiduciary duties." *Id.* at 617. Following *Russell*, the *Simmons* Court explained that "§ 1109 does not permit an individual beneficiary to recover damages for breach of fiduciary duties." *Id.* Thus, the *Simmons* court read *Russell*—inconsistently with the

Eighth Circuit—to limit fiduciary duty claims to the explicit remedy provided by ERISA §§ 409 and 502(a)(2). As *Russell* held, such claims may only be brought on behalf of a plan.[2]

2. Respondents also avoid the central issue presented by the second question of the Petition. The issue is not whether an ERISA fiduciary "must communicate complete and accurate material information" to plan beneficiaries. (Opp. 12) The question is whether an employer does or does not act *in a fiduciary capacity* when communicating information about internal business decisions that may affect the future provision of benefits. (Pet. 16) The court below found that Varity acted as a fiduciary under these circumstances (12a-13a), and then determined that a breach had occurred. The split among the circuits arises in connection with the predicate finding (*see* Pet. 16-18), not the subsequent determination.

It is for this reason that respondents' attempt to avoid the circuit split on the Petition's second question fails. Respondents do not even seek to argue that *Young* v. *Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988), is anything but directly at odds with the ruling below. (*See* Opp. 10) Instead, they mischaracterize *Young* as an "isolated aberration" in the Seventh Circuit, without acknowledging that the two cases they rely upon do not even address

[2] Respondents also contend that cases from the Sixth and D.C. Circuits "have implicitly recognized an individual right of recovery." (Opp. 5) Neither case cited by respondents supports their position. *Eddy* v. *Colonial Life Insurance Co. of America*, 919 F.2d 747 (D.C. Cir. 1990), did not discuss in any way the issue presented here. In *Warren* v. *Society National Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991), the sole issue was whether monetary damages are available as "equitable relief" under § 502(a)(3). *Warren* is no longer good law after this Court's decision in *Mertens*. As respondents are forced to admit, more recent Sixth Circuit decisions have "indicated that no individual right of recovery for breach of fiduciary duty would be recognized." (Opp. 5 n.3) (citing *Tregoning* v. *American Community Mutual Insurance Co.*, 12 F.3d 79 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1832 (1994); *Tassinare* v. *American National Insurance Co.*, 32 F.3d 220 (6th Cir. 1994)).

the question of when an employer acts in a fiduciary capacity.[3] Respondents assert that *Borst* v. *Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), does not conflict "directly" with the decision below. (Opp. 12) This ignores the court's holding that misrepresentations concerning plan assets made during the course of a merger were "statements of intended action [made] in [the company's] corporate nonfiduciary capacity", *id.* at 1323 n.28—language that could not conflict more directly with the decision below. Likewise, *Lea* v. *Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990), was based, as respondents themselves acknowledge, on a finding that "neither the employer nor the union were acting as fiduciaries" (Opp. 11) when they promised—a promise upon which they reneged—to channel benefits to disabled employees. As for *Blaw Knox Retirement Income Plan* v. *White Consolidated Industries, Inc.*, 998 F.2d 1185 (3d Cir. 1993), misrepresentations concerning a plan's liabilities were made by the employer during the course of negotiations, and those misrepresentations were the basis of plaintiffs' breach of fiduciary duty claim. The court rejected the claim because the negotiations were undertaken by the employer in a nonfiduciary capacity. 998 F.2d at 1189.[4]

[3] *Peoria Union Stock Yards Co. Retirement Health Plan* v. *Penn Mutual Life Insurance Co.*, 698 F.2d 320 (7th Cir. 1983), simply states (as respondents acknowledge (Opp. 10-11)) that "*if* Penn Mutual was a fiduciary, the alleged misrepresentations" violated ERISA. *Id.* at 326 (emphasis added). *Anweiler* v. *American Electric Power Service Corp.*, 3 F.3d 986 (7th Cir. 1993), is but a restatement of an ERISA fiduciary's disclosure obligations, and respondents do not suggest that it stands for anything more. (Opp. 11)

[4] Respondents' assertion that *Blaw Knox* does not reflect the "prevailing rule" in the Third Circuit (Opp. 9-10) is unpersuasive. *Bixler* v. *Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993), involved the actions of a pension fund, not an employer; there was (and could be) no issue as to whether the fund wore an employer "hat" and thus no question that the fund acted in a fiduciary capacity. *Fischer* v. *Philadelphia Electric Co.*, 994 F.2d 130 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993), was decided before *Blaw Knox*.

Respondents' attempt to draw some sort of distinction between affirmative misrepresentations and omissions is unavailing. Whether characterized as a misrepresentation or an omission, a misleading statement can only breach ERISA's fiduciary provisions when the person who made the statement was acting in a fiduciary capacity. (Pet. 20-21 & n.10) Respondents' quoting of statutory language regarding a fiduciary's "fundamental obligations" (Opp. 13) begs the question.

This Court's recent decision in *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223 (1995), confirms that " '[a] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan' ". *Id.* at 1228 (citation omitted). *Schoonejongen* further confirms that ERISA's "elaborate", "core functional" reporting and disclosure provisions constitute the universe of a fiduciary's information obligations, 115 S. Ct. at 1231, and that ERISA plan beneficiaries "learn their rights and obligations" only through "reliance on the face of written plan documents." 115 S. Ct. at 1230. (*See* Pet. 20-21 & nn.9-10)

Respondents do not dispute that the court below found no misrepresentation of plan terms. Nor do they dispute that Varity informed them in writing of a reservation of rights in 1984—long before the their transfer to MCC. Nor, in fact, do they dispute that the court found no violation by Varity of ERISA's exhaustive reporting and disclosure requirements. (*See* Pet. 22) Respondents suggest only that because the court found Varity to have misled employees regarding MCC's likely financial viability (therefore potentially affecting their expectation that benefits would remain unchanged), Varity must somehow have violated the "care, skill, prudence" language of ERISA's fiduciary provisions. (Opp. 13) But if—as is the case here—these statements were made while Varity

was acting in its corporate non-fiduciary capacity (Pet. 23-24 & n.12), *a fortiori* there can be no finding of liability.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
April 10, 1995

Respectfully submitted,

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[5] Respondents' assertion that issuance of the writ is "unwarranted" because the judgment "would nevertheless be sustainable" on alternate theories of liability not reached by the Eighth Circuit (Opp. 14) adds nothing. The court below held that respondents were entitled to equitable relief solely on the basis of the breach of fiduciary duty claim—a claim respondents concede presents a circuit split.

(3)

No. 94-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT FILED MARCH 6, 1995
CERTIORARI GRANTED APRIL 24, 1995

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LIST OF DOCUMENTS PRINTED IN APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

The items set forth below have been previously printed in the Petition for a Writ of Certiorari. Pursuant to Rule 26.1, they are not reproduced herein, but for the convenience of the Court are listed in chronological order (with their corresponding page numbers in the appendix to the Petition).

Chronological List of Relevant Docket Entries

October 26, 1988	Complaint filed.
December 13, 1988	Defendants' motion to dismiss the complaint filed.
December 19, 1988	Plaintiffs' motion for preliminary injunction filed.
July 14, 1989	Order of the district court granting plaintiffs' motion for preliminary injunction and denying defendants' motion to dismiss.
July 25, 1989	Defendants' notice of appeal to the Eighth Circuit from order granting preliminary injunction filed.
August 8, 1989	Answer filed.
September 1, 1989	Plaintiffs' motion for class certification filed.
February 15, 1990	Decision of Eighth Circuit vacating preliminary injunction.
April 18, 1990	Defendants' motion for summary judgment filed.
September 11, 1990	Order of the district court granting defendants' motion for summary judgment as to retiree-plaintiffs, and certifying that order for interlocutory appeal to the Eighth Circuit.
September 21, 1990	Plaintiffs' motion to file interlocutory appeal pursuant to 28 U.S.C. § 1292(b), seeking reversal of district court order

	granting summary judgment as to retiree-plaintiffs filed.
November 14, 1990	Decision of the Eighth Circuit denying plaintiffs' motion to file interlocutory appeal from district court order granting summary judgment for defendants as to retiree-plaintiffs.
November 26, 1990	Plaintiffs' motion for reconsideration of order granting summary judgment for defendants as to retiree-plaintiffs filed.
June 4, 1991	Order of the district court granting plaintiffs' motion for reconsideration, vacating prior grant of summary judgment as to retiree-plaintiffs, and granting plaintiffs' motion for class certification.
August 16, 1991	Amended Complaint filed.
August 26 - September 23, 1991	Jury trial, days one through eighteen, including rendering of verdict.
September 30, 1991	Judgment entered.
October 15, 1991	Defendants' motion for judgment notwithstanding verdict or, in alternative, for new trial filed.
March 26, 1993	Findings of fact and conclusions of law of the district court.

March 26, 1993	Order of the district court granting in part and denying in part motions for judgment notwithstanding verdict and new trial.
April 15, 1993	Plaintiffs' election of remedies filed.
April 22, 1993	Defendants' notice of appeal filed.
April 26, 1993	Plaintiffs' notice of appeal filed.
September 29, 1994	Decision of the Eighth Circuit affirming the judgment of the district court and remanding.
October 13, 1994	Defendants' petition for rehearing with suggestion for rehearing en banc filed.
October 13, 1994	Defendants' motion to clarify the September 29, 1994 decision of the Eighth Circuit filed.
December 5, 1994	Order of the Eighth Circuit denying defendants' petition for rehearing with suggestion for rehearing en banc, with Judge Hansen and Judge Bowman voting to grant the suggestion for rehearing en banc.
December 8, 1994	Order of the Eighth Circuit granting defendants' motion to clarify September 29, 1994 decision of the Eighth Circuit.

March 6, 1995	Defendants' petition to the United States Supreme Court for a writ of certiorari to the Eighth Circuit filed.
April 24, 1995	Order of the United States Supreme Court granting defendants' petition for a writ of certiorari.

EXCERPT FROM MASSEY-FERGUSON INC. BENEFITS PLAN
(EXCERPT FROM TRIAL EXHIBIT 156)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

---

[*][1]

MASSEY FERGUSON INC. EMPLOYEE BENEFITS PLAN INDEX

[1] Bracketed asterisks indicate beginning of page in original document.

[*]

[*]

[2] Material not included in Joint Appendix.

MASSEY-FERGUSON INC.
EMPLOYEE BENEFITS PLAN

Section 1. Establishment of Plan:

Massey-Ferguson Inc., a Maryland corporation, (herein called the "Company"), hereby creates and establishes an employee benefits plan, which shall be known respectively, as from time to time amended or supplemented, as the Massey-Ferguson Inc. Employee Benefits Plan (herein called the "Plan"), pursuant to which the Company and certain of its present and future subsidiary or affiliated companies, which adopt the Plan with the consent of the Company, may provide benefits to those of their employees who qualify for eligibility under the terms of the Plan. It is the intention of the Company that there be created a "Voluntary Employees' Beneficiary Association" under Section 501(c)(9) of the Internal Revenue Code of 1954 as amended (hereinafter called the "Code") and the regulations promulgated thereunder. The terms of the Plan are as follows:

Section 2. General Definitions:

Wherever used herein, unless the context clearly indicates otherwise, the following words, wherever capitalized, shall have the following meanings:

[*]

2.1 "Act" means the Employee Retirement Income Security Act of 1974 (including amendments of the Code affected thereby), and the rules and regulations issued thereunder.

2.2 "Board" shall mean the Board of Directors of the Company or the Executive Committee of such Board of Directors when acting for the Board.

2.3 "Committee" shall mean the administrative committee duly appointed and constituted to administer the Plan.

2.4 "Employer" means the Company and future participating companies to the Plan and Trust Agreement.

2.5 "Plan Year" shall mean the twelve month period ending on October 31st of each year, except the initial year when such Plan Year shall be the partial year ending on October 31, 1978.

2.6 "Trust" shall mean the Massey-Ferguson Inc. Employee Benefits Trust Agreement as in effect from time to time. Said Trust Agreement is hereby incorporated into this Plan by reference. "Trust Fund" shall mean the fund held by the Trustee of the Trust under the Plan.

2.7 "Trustee" shall mean the person appointed from time to time by the Board. A corporation or a national banking association is a person for purposes of this Plan.

2.8 "Voluntary Employees' Beneficiary Association" shall mean the association of Employees created upon execution [*] of the Plan and Trust pursuant to § 501(c)(9) of the Code for the purpose of providing for the payment of benefits to members of the Association in accordance with provisions of the Plan and Trust.

Section 3. Long-Term Disability Benefits:

Long-term disability benefits shall be provided for certain salaried employees under the following terms and conditions:

3.1 A plan of long-term disability benefits marked Appendix A has been attached hereto and is hereby incorporated by reference. Such benefits shall be provided in accordance with this Section 3 and other applicable provisions of the Plan and Trust.

3.2 "Effective Date" of Section 3 means the first day of August, 1978.

3.3 "Employee" under this Section 3 means all active salaried employees of the Company, who meet the requirements for eligibility set forth in Appendix A of this Plan.

3.4 The Plan of benefits set forth in Appendix A may be amended from time to time in accordance with Section 7 of this Plan.

Section 4. Medical and Accident Benefits.

Medical, accident and other benefits shall be provided for certain employees under the following terms and conditions:

[*]

4.1 A plan of benefits marked Appendix B has been attached hereto and is hereby incorporated into this Plan by reference. Such benefits shall be provided in accordance with this Section 4 and other applicable provisions of the Plan and Trust.

4.2 The "Effective Date" of Section 4 means the first day of November, 1978.

4.3 "Employee" under this Section 4 means all employees of the Company who meet the requirements for eligibility set forth in Appendix B of this Plan.

4.4 Employees and dependents may be required to contribute under certain circumstances towards the cost of benefits with respect to coverage under the medical and accident benefit provisions of Section 4 of this Plan. Employees and dependents who may be required to contribute, circumstances under which they may be required to contribute, and the amount of contributions are set forth below:

4.4.1 – All Employees on an Employer-approved leave of absence may continue, for up to twelve calendar months, all benefits under this Section, by payment to the Plan of the

appropriate monthly contributions; provided, however, that hourly Employees on leave of absence for local union business are not eligible for such continuation under the terms of the collective bargaining agreements. The required contributions are:

(i) Salaried Employees- bargaining and non-bargaining:

[*]

— Employee only benefits $ 34.34
— Employee and dependent benefits 118.14

(ii) Hourly Employees—bargaining:

— Employee only benefits $ 38.49
— Employee and dependent benefits 125.20

4.4.2 – Surviving dependents of a deceased, salaried Employee who was a participant in Part 2 of the Employer-sponsored Pension Plan, and who was under Age 55 at the time of death, may continue coverage under this Part by making a monthly contribution to the Plan. The monthly contribution shall be the lesser of (a) an amount determined by multiplying the number of covered dependents by $34.34 or (b) $118.14.

4.4.3 – Surviving dependents of a deceased hourly Employee may continue coverage per the collective bargaining agreement. To be eligible, there must be, at the time of the Employee's death, a surviving spouse at least 45 years of age. Coverage for such dependents may be continued to the earlier of:

(i) The spouse's attainment of age 62;
(ii) Remarriage of the spouse;

(iii) The spouse's attainment of eligibility for full widow or widower's insurance benefits or old age survivor's benefits under the Federal Social Security Act (as now in effect or hereafter amended).

The required monthly contribution for continuation of coverage for surviving dependents of deceased hourly Employees is the lesser of (a) an amount determined by multiplying the number of covered dependents by $38.49 or (b) $125.20.

4.4.4 – Hourly Employees not on Supplemental Unemployment Benefits while on a layoff, qualifying under Section 1.03 of the Massey-Ferguson Inc. Supplemental Unemployment Benefit Plan, may continue for a period of twelve calendar months, benefits [*] under this Section by paying to the Plan the appropriate monthly contribution. The required contributions are:

(i)	Employee only benefits	$ 38.49
(ii)	Employee and dependent benefits	125.20

4.5 The Plan of Benefits set forth in Appendix B may be amended from time to time in accordance with Section 7 of this Plan.

Section 5. Funding:

Each Employer shall make such contributions under the Plan to the Trust at such time and in such amounts as shall be determined by the Board to be necessary to maintain the Plan on a sound financial basis and to provide the benefits payable under the Plan.

Section 6. Administration by Committee

6.1 The Committee shall consist of a Chairman and not less than two, nor more than four other individuals who shall be appointed by the Board to serve at the pleasure of the Board. Any member of the Committee may resign and his successor, if any, shall be appointed by the Board. The Committee shall be responsible for the general administration and interpretation of the Plan and for carrying out its provisions, except to the extent all or any of such obligations specifically imposed on the Trustee or the Board. The Chairman of the Committee shall also serve as the Plan Administrator, and shall be agent [*] for service of legal process of the Plan. The Chairman may be empowered and act for the Committee as it so determines.

6.2 The Committee shall also elect a Secretary and may elect an acting Secretary, either of whom may be, but need not be, a member of the Committee. The Committee may appoint from its membership, such subcommittees with powers as the Committee shall determine, and may authorize one or more of its members, or any agent, to execute or deliver any instruments or to make any payment in behalf of the Committee.

6.3 The Committee shall hold such meetings upon such notice at such places and at such intervals as it may from time to time determine. Notice of meetings shall not be required if notice is waived, in writing, by all of the members of the Committee at the time in office, or if all such members are present at the meeting.

6.4 A majority of the members of the Committee, at the time in office, shall constitute a quorum for the transaction of business. All resolutions or other actions taken by the Committee at any meeting, shall be by vote of a majority of those present at any such meeting and entitled to vote. Resolutions may be adopted

or other action taken, without a meeting, upon written consent thereto, signed by all of the members of the Committee.

[*]

6.5 The Committee shall maintain full and complete records of its deliberations and decisions. Its records shall contain all relevant data pertaining to individual Employees and their rights under the Plan and in the Fund.

6.6 Subject to the limitations of the Plan and of the Act, the Committee may, from time to time, establish rules or by-laws for the administration of the Plan and the transactions of its business.

6.7 No individual member of the Committee shall have any right to vote or decide upon any matter relating solely to himself or to any of his rights or benefits under the Plan (except that such member may sign unanimous written consent to resolutions adopted or other action taken without a meeting).

6.8 The Committee may correct errors and, so far as practical, may adjust any benefit, credit or payment accordingly.

6.9 Subject to the claims procedure set forth in Section 11, the Committee shall have the duty and authority to interpret and construe the provisions of the Plan and to decide any dispute which may arise regarding the rights of Employees hereunder, which determinations shall apply uniformly to all persons similarly situated and shall be binding and conclusive upon all interested persons.

6.10 The Committee may engage an actuary, attorney, accountant, [*] or any other technical advisor on matters regarding the operation of the Plan and to perform such other duties as shall be required in connection therewith, and may employ such clerical and related

personnel as the Committee shall deem requisite or desirable in carrying out the provisions of the Plan. The Committee shall, from time to time, but no less frequently than annually, and with the advice of an actuary, review the financial condition of the Plan and determine the financial needs of the Plan in relation to the liabilities and obligations thereof and the requirements of the Act. The Committee shall communicate such financial needs to the Company and to the Trustee so that the funding policy and investment policy may be appropriately coordinated to meet such needs.

6.11 No fee or compensation shall be paid to any member of the Committee for his services as such.

6.12 The Committee shall be entitled to reimbursement out of the Trust Fund for its reasonable expenses properly and actually incurred in the performance of its duties in administration of the Plan, provided that the Board may, by written notice to the Trustee, provided that all or any portion of such expenses shall be paid by the Company.

6.13 The Committee shall determine whether an individual is an Employee, and the decision of the Committee shall be [*] final and conclusive.

Section 7. Management of Funds and Amendment or Termination of Plan:

7.1 All assets of the Plan shall be held in a Trust which shall be established and administered to fund and to provide for the payment to the Employees or their dependents or their successors in interest benefits as provided in the Plan out of the income and principal of the Trust. All Fiduciaries (as defined in the Act), with respect to the Plan, shall discharge their duties as such solely in the interest of the Employees or their dependents or their successors in interest, and (i) for

the exclusive purposes of providing benefits to Employees or their dependents or their successors in interest and defraying reasonable expenses of administering the Plan, including the Trust which is a part of the Plan, (ii) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of like character and with like aims, and (iii) in accordance with the Plan and Trust, except to extent such documents may be inconsistent with the Act. Notwithstanding the foregoing provisions of this Section 7.1, the following special provisions shall apply:

[*]

7.1.1 – Initial Non-Qualification: If the Plan fails initially to satisfy the qualification requirements of Section 501(c)(9) of the Code, and if the Company declines to amend the Plan to satisfy such qualification requirements, contributions made prior to the determination that the Plan has failed to qualify, shall be returned to the Company.

7.1.2 – Disallowance of Deduction: To the extent that a Federal Income Tax deduction is disallowed for any contribution made by an Employer, the Trustee shall immediately refund to the Employer, the amount so disallowed, upon presentation, within one year of the date of such disallowance, of evidence thereof and a demand by the Employer for such refund.

7.1.3 – Loss of Qualified Status: If it is determined that the Plan does not constitute a qualified Plan for any Plan Year, there shall be returned to each Employer, upon demand,

any contribution made by each Employer, with respect to any year in which the qualified status is denied, provided that demand is made be each Employer and refund is made by the Trustee, within one year of the date of denial of qualification of the Plan.

7.1.4 – If, following a complete termination of the Plan, there are assets in the Trust Fund after all liabilities of the Plan to Employees or their dependents or their successors in interest have been satisfied, such remaining assets shall be distributed among the Employers in accordance with the determination made by the Board except as otherwise provided under the Act.

7.1.5 – In the case of a contribution made by a mistake in fact, such contribution shall be returned to the appropriate Employer without interest or other increment, as soon as practical, but not later than one year after payment thereof.

7.2 The Company and the Trustee shall enter into an appropriate Trust Agreement, which shall be a part of the Plan, for [*] the administration of the Trust under the Plan. Such agreement shall contain such powers and reservations as to controls and disbursement of the funds of the Trust, and such other provisions not inconsistent with the provisions of this Plan and its nature and purpose, and the Act, as shall be agreed upon and set forth therein. Said agreement shall provide that the Board may remove the Trustee at any time, upon reasonable notice, that the Trustee may resign at any time, upon reasonable notice, and that upon such removal or resignation of the Trustee, the Board shall designate a successor-Trustee.

7.3 All requests, directions, requisitions and instructions of the Committee to the Trustee shall be in writing and signed by the Committee's Chairman or acting Chairman and by its Secretary or acting Secretary.

7.4 The Company hereby reserves the right, by action of the Board, to amend or terminate the Plan or Trust at any time, provided no such amendment or termination shall have the effect of diverting the Trust funds to purposes other than the exclusive benefit of the Employees except as provided in Section 7.1. However, the right to amend or terminate the Plan shall not, in any way, affect an Employee's right to claim benefits, diminish, or eliminate any claims for benefits under the provisions of the Plan to which the Employee shall have become entitled prior [*] to the exercise of the Company's right, through its Board, to terminate or amend.

Section 8. Allocation of Responsibilities Among Named Fiduciaries:

8.1 The Named Fiduciaries, with respect to the Plan and the responsibilities allocated to each, are as follows:

8.1.1 – Board:

(i) To amend the Plan;

(ii) To appoint and remove Trustees under the Plan;

(iii) To determine the amount to be contributed to the Plan by the Company and each Employer; and

(iv) To terminate the Plan.

8.1.2 – Committee:

(i) To interpret the provisions of the Plan and to determine the rights of Employees under the Plan, except to the extent otherwise provided in Section 11 relating to claims procedure;

(ii) To administer the Plan in accordance with its terms, except to the extent powers to administer the Plan are specifically delegated to another named fiduciary or other person or persons as provided in the Plan;

(iii) To direct the Trustee in the distribution of the Trust assets; and

(iv) To determine the eligibility of any person to be, or to become, an Employee under the Plan.

8.1.3 – Plan Administrator:

(i) To file such reports as may be required to the United States Department of Labor, [*] the Internal Revenue Service, and any other governmental agencies to which reports may be required to be submitted from time to time;

(ii) To comply with requirements of law for disclosure of Plan provisions and other information relating to the Plan to Employees and other interested parties; and

(iii) To administer the claims procedure to the extent provided in Section 10.

8.1.4 – Trustee:

(i) To invest and reinvest Trust assets;

(ii) To make distributions to Plan Employees as directed by the Committee;

(iii) To render annual accountings to the Committee as provided in the Trust Agreement; and

(iv) Otherwise to hold, administer, and control the assets of the Trust as provided in the Plan and Trust.

8.2 Except as otherwise provided in the Act, a Named Fiduciary of the Plan shall be responsible and liable only for its own acts of ommission with respect to fiduciary duties specifically allocated to him and designated as his responsibility.

8.3 Indemnification by Company: Notwithstanding any foregoing provision, the Company shall indemnify and save harmless each Committee member and the Plan Administrator from any liabilities incurred by them in the exercise and performance of their powers and duties under this Agreement except where attributable to their fraud, misfeasance,willful neglect, [*] affirmatively proved; but any amount paid by the Company shall be reimbursed to the Company by the Trust Fund, if sufficient funds are available, and shall be deemed an expense for purposes of Subsection 6.12.

Section 9. Benefits Not Assignable:

9.1 No portion of the benefit, with respect to any Employee, shall be subject, in any manner, to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, or charge, except as so provided in Section 9.3, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber, or charge the same, shall be void; nor shall any portion of such benefit be in any manner payable to any assignee, receiver, or trustee, or be liable for the Employee's debts, contracts, liabilities, engagements, or torts, or be subject to any legal process to levy upon or attach.

9.2 If any Employee shall by physically, mentally, or legally incapable of receiving or acknowledging receipt of any payment under the Plan to which he is entitled, the Committee, upon receipt of satisfactory evidence of his incapacity and satisfactory evidence that another person or institution is maintaining him and that no guardian or committee has been appointed

for him, may cause any payment otherwise payable to him to be made to such person or institution so maintaining him.

[*]

9.3 Medical benefits, provided by this Plan, may be assigned, to physicians, hospitals, and other health care providers, upon the Employee's execution of a plan-provided assignment of benefits form. However, such assignment shall only be effective as to those costs covered by this Plan.

Section 10. Communication to Employees:

In accordance with the requirements of the Act, the Company shall communicate the principal terms of the Plan to the Employees. The Company shall make available for inspection, by Employees and their beneficiaries, during reasonable hours at the principal office of the Company and at such other places as may be required by the Act, a copy of the Plan, the Trust Agreement, and of such other documents as may be required by the Act.

Section 11. Claims Procedure:

11.1 An Employee or his dependent may present a claim for benefits under this Plan by submitting written proof of claim to the Committee or the delegate of the Committee. The Committee shall furnish forms for this purpose. The Committee may, under reasonable circumstances and at any reasonable time, require an Employee or dependent to furnish certification by a physician or other practitioner of the healing arts in support of the claim.

11.2 If an Employee or beneficiary believes that he is [*] entitled to benefits under the Plan which are not being paid to him, he (herein called the "Claimant") may file a written claim with the Plan Administrator (as

defined in Section 6.1). The Plan Administrator shall decide whether the claim shall be allowed in whole or in part. In the event that the Plan Administrator shall wholly or partially deny the claim for benefits made by any Claimant, written notice of such denial shall be furnished to the Claimant within thirty (30) days following receipt of the claim by the Plan Administrator. Such notice shall be worded in a manner calculated to be understood by the Claimant and shall set forth: (i) specific reason or reasons for the denial; (ii) specific references to pertinent Plan provisions on which the denial is based; (iii) a description of any additional material or information necessary for the Claimant to perfect the claim and an explanation of why such material or information is necessary; and (iv) an explanation of the Plan's review procedure. Within sixty (60) days following receipt of such notice by the Claimant, or within sixty (60) days following the close of the above-mentioned thirty-day period, if the claim is not allowed and such notice is not received within such thirty-day period, such Claimant may appeal denial of the claim by filing, in writing, with the Committee, [*] a written application for review. Following request for such review, the Committee shall fully and fairly review the decision denying the claim. Prior to the decision of the Committee, the Claimant shall be given an opportunity to review pertinent documents and to submit issues and comments in writing. The Committee shall make its decision regarding the merits of the claim promptly, and within sixty (60) days following receipt by it of the request for review (or within 120 days after such receipt, in a case where there are special circumstances requiring extension of time for processing the claim), shall deliver the decision to the Claimant in writing. Such decision shall set forth specific reasons for the decision, shall be worded in a manner calculated to be understood by the

Claimant, and shall cite specific references to the pertinent Plan provisions on which the decision is based. All actions set forth herein to be taken by the Claimant, may likewise be taken by a representative of the Claimant duly authorized by him to act in his behalf in such matters. The Committee may require such evidence as it may reasonably deem necessary or advisable of the authority to act of any such representative. In the event the Claimant shall be the Plan Administrator, all actions set forth in this Section 11 to be taken by the Plan Administrator, shall instead be [*] taken by the Secretary of the Committee.

Section 12. General Provisions:

Neither the establishment of the Plan or Trust hereby, nor any modification thereof, nor the creation of any fund or account, nor the payment of any benefits, shall be construed as giving to any Employee or other person, any legal or equitable right against the Company, or any officer or employee thereof, or the Board, or the Committee, or the Plan Administrator, or the Trustee, except as herein provided. Under no circumstances shall the terms of this Plan constitute a contract of continuing employment or in any manner obligate the Company to continue or discontinue the service of an Employee.

Section 13. Administrative Services Only Contract:

The Committee shall have the right to direct the Trustee to enter into an Administrative Services Only Contract with a third party Claims Administrator (hereinafter called the "Claims Administrator") whereby the Claims Administrator will furnish administrative services in connection with the Plan. The Administrative Services Only Contract may authorize the Claims Administrator to act as agent for the Committee in receiving and processing claims for ben-

efits under the Plan, disbursing claim payments under the Plan, and performing such addi-[*]tional duties as set forth in such Administrative Services Only Contract.

Section 14. Insurance and Reinsurance Contracts:

The Committee shall have the right to direct the Trustee to enter into contracts of insurance and reinsurance with insurance companies, brokers, or underwriting groups to provide such limitations of liability to the Plan as may be appropriate from time to time.

Section 15. Adoption by Subsidiary and Affiliate Companies:

The Company may, by resolution, provide for participation in the Plan and Trust Agreement by other subsidiary or affiliated companies. The following special provisions shall apply to the Company and all such participating subsidiary and affiliated companies ("Employers") to the Plan except as otherwise expressly provided herein or in a separate agreement.

15.1 For purposes of the Plan, employment shall not be deemed to be interrupted by the transfer, at any time, of an Employee from the employment of one Employer to the employment of another Employer, it being the intent hereof that interchangeable employment with the Employers, shall not affect adversely, the eligibility or benefits of any Employee affected thereby.

15.2 The Committee, as designated by the Board of the Company, [*] shall be the Committee with respect to all Employers to the Plan.

Section 16. Miscellaneous.

16.1 Governing Law and Rules of Construction. This Plan shall be governed in all respects, whether as to construction, capacity, validity, performance, or otherwise, by the laws of the State of Iowa.

16.2 Interpretation. Wherever reasonably necessary, provisions of any gender shall be deemed synonymous, as shall singular and plural pronouns.

16.3 Headings. The index to this Plan and the headings to the Articles and Paragraphs of this Plan are included solely for convenience and shall in no event affect, or be used in connection with, the interpretation of this Plan.

16.4 Severability. Each provision of this Plan shall be treated as severable, to the end that, if any one or more provisions shall be adjudged or declared illegal, invalid, or unenforceable, this Plan shall be interpreted, and shall remain in full force and effect, as though such provision or provisions had never been contained in this Plan.

16.5 Counterparts. This Agreement may be executed in two or more counterparts, each of which constitutes an original.

16.6 Miscellaneous Protective Provisions. It is further agreed:

[*]

(a) Any Named Fiduciary may request and rely upon an opinion of counsel, who may or may not be counsel for the Company, and shall be fully protected for any action taken, suffered or omitted in good faith reliance upon such opinion.

(b) No recourse under this Plan, or for any action or non-action hereunder, or for any loss or diminution of the Trust Fund, or for any payment or nonpayment of benefits, or for any other reasons whatsoever relating to the Plan, shall be had by any person whomsoever against any stockholder,

officer, director or employee of any Employer as such, past, present or future nor shall such recourse be had against any Employer, any Trustee, any Plan Administrator, the Committee, or any member or Secretary thereof, except for fraud, misfeasance or willful neglect, affirmatively proved.

(c) Where the establishment of any facts is in question any Named Fiduciary may in its discretion accept as evidence thereof any properly executed instrument or document furnished by any other Named Fiduciary or such other evidence as may seem reasonable under the circumstances.

[*]

IN WITNESS WHEREOF, the Massey-Ferguson Inc. Employee Benefits Plan is, by the authority of the Board of Directors, hereby executed as of the *24th* day of *October*, 1978.

MASSEY-FERGUSON INC.

[SEAL]

/s/ W.R. MEARNS
Vice-President

ATTEST:

/s/ E.H. GRAHAM
Secretary

MEMORANDUM FROM JOHN H. RUTH, DATED DECEMBER 1, 1983
(TRIAL EXHIBIT 585)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—V.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

LETTERHEAD OF MASSEY FERGUSON

December 1, 1983

MEMORANDUM

To: All U.S. Salaried Non-Union Employees

From: John H. Ruth

Subject: *COMPENSATION IMPROVEMENTS*

As you are aware, we are committed to a break-even level at the end of fiscal 1983 and a profit in 1984. However, we reported a U.S. $11.9 million loss in Massey-Ferguson Ltd. in our latest quarter.

In developing our compensation improvements for 1984, consideration has been given to your major sacrifices over the past years which contributed to the survival of the Company.

Therefore, we have committed to the following compensation improvements for all active non-union salaried employees and have incorporated them into the 1984 budget.

° Effective January 1, 1984, employee contributions of $60.00 per family coverage and $30.00 per single coverage towards health coverage will be eliminated.

° On January 1, 1984, a new Comprehensive Major Medical Plan will be in effect. Full details of the Plan will be available to you in the near future. The major features of the Plan follow:

— *LIFETIME MAXIMUM*—$250,000.00 per covered individual

— *DEDUCTIBLES*— $100.00—Single
$200.00—Family

— *CO-INSURANCE*—After the deductibles are satisfied, 80% of covered charges will be paid by Massey-Ferguson through the John

Hancock Mutual Life Insurance Co.; 20% paid by the employee.

— *OUT-OF-POCKET MAXIMUM*—The total payment by employees for both the deductible and co-insurance is limited to $1,100.00—Single, and $2,200.00—Family, in a calendar year, after which the Plan pays covered expenses at 100% of the reasonable and customary fee for the service.

— *THE LIMITATION ON REASONABLE & CUSTOMARY LEVELS* will be removed to allow a continuing correlation between medical costs and payments under the Plan.

[*]

— *COST CONTAINMENT* will be stressed under the new Plan. There will be financial incentives to use provisions such as Second Surgical Opinion, Pre-admission Testing and Out-Patient/Ambulatory Surgical Facilities.

° For those employees currently receiving COLA, the current cost-of-living allowance will be incorporated into their base rate, effective with the first pay period of 1984. This has the added benefit of improving life insurance coverage as well as the pensionable earnings.

° Effective February 1, 1984, for charges incurred on and after that date, reimbursement for Type I and II Dental Services will increase to 80% from the current 50%. The Limitation on Reasonable & Customary Levels will be removed to allow a continuing correlation between dental costs and payments under the Plan.

° Effective February 1, 1984, a Vision Care Plan will be re-introduced. This Plan will provide benefits at intervals of 24 months and more. A change of prescription will not be required.

° Effective February 1, 1984, the Tuition Aid Program will be reinstated.

As I indicated earlier, we are committed as a Company to make a profit in 1984 and I want to provide salaried non-union employees with both the incentive to make it happen and the opportunity to share in the results. Therefore, I am pleased to announce that the Remuneration Plan has been extended through fiscal 1984 (see attached).

We must become profitable in 1984 and with your commitment we will do so!

/s/ JOHN H. RUTH
John H. Ruth
Vice President & General Manager
Marketing & Distribution Operations

Attachment

MEMORANDUM FROM B. D. QUANDT,
DATED DECEMBER, 1983
(EXCERPT FROM TRIAL EXHIBIT 512)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

LETTERHEAD OF MASSEY FERGUSON

memo
to pensioners
Massey Ferguson

December, 1983

117560
JENIVIE L JACK
6417 MOTT AVE
DES MOINES IA 60311 Y

As a concerned Massey-Ferguson pensioner, we are sure you are aware that the Company has suffered a loss of U.S. $41.1 million in the nine months which ended October 31, 1983. Despite this, we are committed to making a profit in 1984.

In preparation for 1984, we have spent long hours reviewing the financial needs of our pensioners and employees, balancing their needs with the financial plight of the Company. While we are still concerned with the continuing depressed market conditions and our ability to achieve our financial plan, we are pleased to announce that your gross monthly pension will be increased by $1.00 effective January 1, 1984. Since First Wisconsin Trust needs additional time to process these increases, your March check will reflect this increased pension plus a retroactive amount for January and February.

Massey-Ferguson provides one of the most complete health care programs available for salaried employees and retirees and their eligible family members. The Massey-Ferguson program provides hospital, surgical, dental, vision, prescription drug and hearing aid benefits.

As you are no doubt aware, health care costs have been escalating at an alarming rate. The outstanding coverage provided by the Company has not escaped this trend. Many major companies have revised their plans to help contain this rate of increase by introducing Comprehensive Major Medical Plans.

We have thoroughly reviewed our benefit plans, and effective January 1, 1984, a new Comprehensive Major Medical Plan will be introduced for all active employees, laid off employees, pensioners and their eligible survivors, and LTD recipients in the U.S.

[*]

The new Plan covers all health benefits and provides that the employee or pensioner pay part of the early costs through deductibles and coinsurance. Full details are attached. The main features of the new Plan follow:

° *LIFETIME MAXIMUM*—$250,000.00 per covered individual.

° *DEDUCTIBLES*— $100.00—Single
$200.00—Family

° *COINSURANCE*—After the deductibles are satisfied, 80% of covered charges will be paid by Massey-Ferguson through the John Hancock Mutual Life Insurance Company; 20% paid by the pensioner.

° *OUT-OF-POCKET-MAXIMUM*—The total payment by pensioners for both the deductible and coinsurance is limited to $1,100.00—Single, and $2,200.00—Family, in a calendar year, after which the Plan pays covered expenses at 100% of the reasonable and customary fee for the service.

° *COST CONTAINMENT* will be stressed under the new Plan. There will be financial incentives to use provisions such as Second Surgical Opinion, Pre-Admission Testing and Out-Patient/Ambulatory Surgical Facilities.

° *MEDICARE*—After age 65, the Plan will be integrated with Medicare and Medicare will continue to be the first payor. The Company will continue to reimburse pensioners over age 65 for the Medicare Part 'B' premium.

° *DRUG PLAN*—Unchanged.

In addition to the above, we have found it necessary to modify the Dental and Vision Care Plans as follows:

- *Dental Plan Charges* for Type I and Type II benefits will be reimbursed at 80% of reasonable and customary levels.
- *Vision Care*—The Vision Care Plan will provide benefits at intervals of 24 months or more, with no change of prescription required.

The modified health coverage will continue to provide you with outstanding protection at minimal cost, and will assist the Company in achieving its primary goal of making a profit in 1984.

[*]

We are aware that you may have questions about the new Comprehensive Major Medical Plan. In order to assist you in answering any queries that you may have, we will install a toll-free number during the week of January 16, 1984. If you wish to take advantage of this service, please call 1-800-247-2123 between the hours of 8:30 AM and 4:00 PM (Central Standard Time) during the period of January 16 - 20, 1984.

In addition, if you require claim forms you should contact the following:

Human Resources Department
Massey-Ferguson Inc.
P.O. Box 1813
Des Moines, Iowa 50306

As you know, the Company, during the last two years, has had two health benefit plans; one for active employees and one for retirees. The plan for active employees has required an employee contribution amount and provided a reduced level of benefits. The high cost of administering two plans combined with escalating health care costs as well as the financial state of the Company require the introduction of a common plan for both active and retired employees.

Sincerely,

/s/ Bryon D. Quandt
B. D. Quandt
Director Human Resources

MEMORANDUM FROM JOHN H. RUTH, DATED DECEMBER 12, 1983, ATTACHING MASSEY-FERGUSON INC. COMPREHENSIVE MAJOR MEDICAL PLAN (Trial Exhibit 511)

In the
UNITED STATES DISTRICT COURT
for the Southern District of Iowa
Central Division

Civil No. 88-1598-E

Charles Howe, Robert Wells, Ralph W. Thompson, Patrick Mousel, on behalf of themselves and as representatives of a class of persons similarly situated, John Altomare, Charles Barron, Alexander Charron, Charlotte Chiles, Anita Crowe, Ray Darr, Doris Guidicessi, Barnett Lucas, Robert Skromme, and the Estate of Walter Smith, Individually,

Plaintiffs,

—v.—

Varity Corporation and Massey-Ferguson, Inc.,

Defendants.

LETTERHEAD OF MASSEY FERGUSON

December 12, 1983

MEMORANDUM

To: All U. S. Non-Union Salaried Employees
From: John H. Ruth
Subject *EMPLOYEE BENEFIT PROGRAM*

On December 1, 1983 the Company announced changes to several Employee Benefit Programs. The purpose of this communication is to provide details of the Comprehensive Major Medical Plan, to clarify the effect of the changes to the Dental and Vision Care Plans, to restate the provisions related to eligibility, to introduce changes to Claim Processing procedures and to restate the Tuition Aid Program.

A. *COMPREHENSIVE MAJOR MEDICAL PLAN*

Attached is a summary description of the Plan. If there are discrepancies between the summary and the Plan document, the Plan document will prevail.

B. *DENTAL PLAN*

All covered charges incurred on and after February 1, 1984 for Type I—Preventative and Type II—Restorative Services, will be reimbursed at 80% of the current Reasonable & Customary rate.

C. *THE LIMITATION ON REASONABLE & CUSTOMARY* levels for the above Plans will be removed to allow a continuing correlation between costs and payments under the Plans.

D. *VISION CARE PLAN*

On February 1, 1984 the Vision Care Plan will provide benefits at intervals of 24 months with or without a prescription change.

E. *HEALTH BENEFIT PLAN ELIGIBILITY*

Individuals participating in the Company's Benefit Plans on December 31, 1983 will be automatically enrolled in the Plans which take effect on January 1, 1984 and February 1, 1984.

Individuals participating in the Company's Benefit Plans on December 31, 1983, may change their status under the Plans if:

- there is a change in marital status;
- there is a change in the employment status of the employee or the employee's spouse;
- the employee has single coverage and acquires an eligible dependent.

Application must be made within 30 days of the above change.

[*]

Employees not participating in the Company's Benefit Plans on December 31, 1983 and employees who elected single coverage, may make application to re-enroll or change their status in the Plans at any time during the next twelve months with coverage commencing on January 1, 1985.

In addition, employees not participating in the Plans on December 31, 1983 are eligible to re-enroll in the Plans prior to January 1, 1985 if:

- there is a change in marital status;
- there is a change in the employment status of the employee or the employee's spouse;
- the employee acquires an eligible dependent.

Application must be made within 30 days of the above change.

F. *CLAIM PROCESSING*

1. Every transaction John Hancock processes cost Massey-Ferguson approximately $12.00. Employees can help reduce this substantial expense by grouping small claims and submitting them in amounts of not less than $50.00. Your cooperation ensures that Massey-Ferguson derives the maximum benefit from its benefits dollars.

2. To ensure that claims subject to Coordination of Benefits are properly processed, John Hancock will no longer process claims, for which the Massey-Ferguson Plan is the primary payor, from photocopies of bills or claim forms.

G. *TUITION AID*

The Tuition Aid program provides reimbursement of 80% of tuition fees, excluding books, upon successful completion of pre-approved courses.

Employees applying for Tuition Aid must complete a "Tuition Aid Request" MF-2413 and have it approved by their immediate supervisor and the Human Resources Department prior to beginning the course. Reimbursement is dependent upon the receipt of evidence that the course has been successfully completed and an itemized receipt for the tuition fee.

Employees eligible for educational assistance under programs such as "Educational Assistance for Veterans and Servicemen" are *not* eligible for Company-paid Tuition Aid program.

[*]

Internal Revenue Code, Section 127, which allows tax-free tuition reimbursements terminates December 31, 1983, making tuition reimbursements in 1984 fully taxable. However, legislation is pending which may return these payments to a tax free status. The progress of this legislation is being monitored.

Please forward any questions you may have to your Human Resources office.

/s/ JOHN H. RUTH
John H. Ruth
Vice President & General Manager
Marketing & Distribution Operations

Attachment

[*]

MASSEY-FERGUSON INC.
COMPREHENSIVE MAJOR MEDICAL PLAN

NOTE: THIS IS A SUMMARY OF THE PLAN. IF THERE ARE DISCREPANCIES BETWEEN THE SUMMARY AND THE PLAN DOCUMENT, THE PLAN DOCUMENT WILL PREVAIL.

[*]

TABLE OF CONTENTS

[*]

COMPREHENSIVE MEDICAL PLAN
SCHEDULE OF BENEFITS

Effective Date: January 1, 1984

Eligible Class: All U.S. Salaried—Non-Bargaining Employees; U.S. Salaried Perkins Engines—Non-Bargaining Employees; and U.S. Salaried Pensioners, Survivors and LTD claimants—Non-Bargaining.

Waiting Period: 31 days continuous active service, for new hires and rehires.

Spouse: For purposes of this plan—wife or husband while not divorced or legally separated from you.

Dependent Children: Age Limit—end of calendar year in which the dependent attains age 25. Coverage for permanently disabled unmarried children continues.

COVERED BENEFITS

Cash Deductible:

Individual $100 per Calendar Year
Family $200 per Calendar Year

All covered family members may contribute to the family deductible.

Coinsurance: 80% of eligible covered expenses with the exception of those outlined below.

Out-Of-Pocket Maximum:

Individual $1,000 per Calendar Year
Family $2,000 per Calendar Year

All covered family members may contribute to the out-of-pocket limit.

(Note: Coinsurance related to treatment received for nervous and mental disorders/alcoholism and drug abuse and any expenses incurred following expiration of the duration limits shown on Page 2 are not applied to the out-of-pocket maximum.)

Aggregate Lifetime Maximum: $250,000.00 per covered individual with restoration of up to $1,000.00 per calendar year.

Covered Expenses Paid at 100%:

- Emergency Care for Accidental Injury or Life Threatening Illness
- Second Surgical Opinion Only (Deductible Waived)—Mandatory for Listed Procedures
- Outpatient and Ambulatory Surgery (Charges for Approved Facility Only)—Mandatory for Listed Procedures
- Pre-Admission Testing
- Extended Care Facility
- Home Health Care
- PAID Prescription Drug Coverage ($2.00 Deductible)
- Hearing Aid Benefit (Deductible Waived)

[*]

LIMITATIONS AND EXCEPTIONS

Maximum Daily Private or Semi-Private Room and Board Rate will be considered at 100% of the hospital's charge for the highest priced semi-private accommodations subject to deductible and coinsurance. In other accommodations—will be considered at 100% of the full charge made subject to deductible and coinsurance.

Nervous and Mental Disorder and Alcohol and Drug Abuse Limits—

Coinsurance	— Outpatient	50%
	— Inpatient	80%
Lifetime Maximum		$25,000

Second Surgical Opinion—If a second opinion is not obtained on Listed Procedures, the Plan will only pay 65% of covered the surgical fee.

Outpatient and Ambulatory Facility—If a listed Procedure is performed on an inpatient basis room and board expenses will not be paid, unless confinement is for an emergency or is medically necessary.

Duration Limits—

Inpatient Nervous and Mental Disorder/ Alcoholism and Drug Abuse	90 Days per Calendar Year
Outpatient Nervous and Mental Disorder/ Alcoholism and Drug Abuse	50 Visits per Calendar Year
Extended Care Facility	120 Days per Period of Confinement or Calendar Year
Home Health Care	60 Visits at 4 Hours per Visit

Room and Board Charge for Weekend Admission (Friday afternoon through Sunday morning) for elective and/or non-emergency surgery will not be paid.

Hearing Aid Benefit

Audiometric Examination	$30.00
Hearing Aid Evaluation Test	$30.00
Hearing Aid, Including Mold	$275.00

(Note: Benefits are available for each subsequent hearing aid once every three years.)

THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES OF COVERED INDIVIDUALS AT ANY TIME.

[*]

Satisfying The Cash Deductible

The Cash Deductible is satisfied by incurring, while covered, medical expenses in excess—$100.00 Single—$200.00 Family.

Only Covered Expenses incurred in a Calendar Year shall be applied to satisfy the Cash Deductible for that year.

Reinstatement Of Aggregate Maximum Benefit

On January 1 of each year, the amount of the benefits which became payable in the past but which were not previously reinstated shall be automatically restored by up to $1,000 but in no event shall the aggregate maximum benefit exceed $250,000.00.

[*]

What Are "Covered Expenses"

The reasonable and customary charges made for any of the following:

1. Hospital Confinement
   (a) Board and room charges.
   (b) Charges for other services and supplies furnished by the hospital for use during confinement (but not for special nursing services or physicians' services).
2. Medical treatment or surgical procedure by a physician.

3. Private duty nursing service by a registered or licensed nurse if the physician recommends such service, provided the nurse is not a member of the immediate family or household.

4. Local use of ambulance.

5. Certain services and supplies:

   (i) prescription drugs and medicines through the PAID Prescription Plan.

   (ii) anesthetics and oxygen and their administration.

   (iii) rental of durable medical equipment, designed primarily for use in a hospital for therapeutic purposes.

   (iv) blood and blood plasma, and their administration, to the extent not replaced by donations.

   (v) braces, crutches, and prosthesis necessitated by injury or disease occurring while insured (not including repair or maintenance).

   (vi) x-ray examinations and laboratory tests.

   (vii) physiotherapy.

6. Diagnosis and treatment of nervous and mental conditions by a psychologist, to the extent they would be covered if made by a psychiatrist.

[*]

7. Extended Care Facility

   Charges for the following services and supplies, if confinement is by means of direct transfer from a hospital in which the individual was confined for at least 3 days, and for the same condition that caused the hospital confinement.

   The following are extended care facility services and supplies:

   (i) board and room and nursing care (but not private-duty nurse or attendant).

   (ii) physical therapy, occupational therapy and speech therapy.

   (iii) medical social service.

   (iv) biologicals, supplies, appliances and equipment ordinarily provided by the facility for care of patients.

   (v) medical care by an intern or resident-in-training of a hospital and other diagnostic and therapeutic services furnished to extended care facility patients by a hospital.

   (vi) other necessary services generally provided to patients by extended care facilities.

8. Tubal legations and voluntary vasectomies. Reversals are not covered.

9. Pre-Admission testing charges made by a hospital.

10. Second surgical opinion on the need for undergoing non-urgent surgery.

   (a) If the second opinion differs from the initial opinion which recommends the surgery, the benefit will also be payable, if the person before undergoing the surgery, obtains a third opinion on the need for the surgery and this opinion is furnished by a physician not involved in either earlier opinion.

   (b) the benefit payable for a second or third opinion, is an amount equal to the sum of the following charges, to the extent such charges are reasonable and customary:

   (i) the physician's charge for furnishing such opinion, and

   (ii) charges incurred for necessary and ancillary tests undergone at the recommendation of the physician furnishing such opinion.

[*]

   (c) The surgical procedures for which a second surgical opinion is required are:

(i) breast surgery;
(ii) cataract surgery;
(iii) cholecystectomy;
(iv) inguinal heriorraphy;
(v) foot surgery;
(vi) gastroectomy;
(vii) hemorrhoidectomy;
(viii) hip replacement;
(ix) hysterectomy
(x) knee surgery;
(xi) prostatectomy;
(xii) sinus operation;
(xiii) spinal surgery;
(xiv) submucous resection of the nasal septum;
(xv) tonsillectomy.

A SECOND OPINION IS NOT REQUIRED FOR EMERGENCY SURGERY OR ANY SURGICAL PROCEDURE NOT LISTED.

[*]

11. Outpatient and Ambulatory Surgical Facility Procedures as outlined below. If these specific procedures are not performed in the outpatient department of a hospital, or in an ambulatory surgical facility, the surgery will be reimbursed as a normal covered expense. However, Room and Board charges for those procedures performed in the hospital will *not* be a covered expense under the Plan unless medical necessity requires hospital confinement.

SCHEDULE OF OUTPATIENT AND
AMBULATORY SURGICAL OPERATIONS

OTOLARYNGOLOGY/AUDITORY SYSTEM

1. Treatment of closed or open nasal fracture without manipulation.
2. Myringotomy including aspiration and/or eustachian tube inflation.

3. Tympanostomy (requiring insertion of ventilating tube), local or topical anesthesia; unilateral.
4. Tympanostomy (requiring insertion of ventilating tube), local or topical anesthesia; bilateral.
5. Tympanostomy (requiring insertion of ventilating tube), general anesthesia; unilateral.
6. Tympanostomy (requiring insertion of ventilating tube), general anesthesia; bilateral.

GENERAL SURGERY/INTEGUMENTARY SYSTEM

7. Biopsy of skin, subcutaneous tissue and/or mucous membrane (including simple closure), unless otherwise listed (separate procedure); one lesion.
8. Biopsy of skin, each additional lesion.
9. Excision of nail and nail matrix, partial or complete (eg, ingrown or deformed nail), for permanent removal.

[*]

10. Repair of superficial wounds.
11. Biopsy of breast; needle (separate procedure).
12. Biopsy of breast; incisional.

GENERAL SURGERY/DIGESTIVE SYSTEM

13. Esophagogastroduodenoscopy, diagnostic.
14. Esophagogastroduodenoscopy; with removal of polyp(s).
15. Proctosigmoidoscopy; diagnostic (separate procedure).
16. Proctosigmoidoscopy; with removal of polyp or papilloma.
17. Sigmoidoscopy, flexible fiberoptic; diagnostic.

18. Sigmoidoscopy, flexible fiberoptic; with removal of polyp(s).

19. Surgical removal of impacted teeth.

20. Repair of inguinal hernia, under age 5 years, with or without hydrodelectomy; unilateral.

21. Repair of inguinal hernia, under age 5 years, with or without hydrodelectomy; bilateral.

GYNECOLOGY/FEMALE GENITAL SYSTEM

22. Biopsy, single or multiple, or local excision of lesion, with or without fulguration (separate procedure).

23. Biopsy of cervix, with or with D&C.

24. Dilation and curettage, diagnostic and/or therapeutic.

25. Legal (therapeutic) abortion, completed with D&C and/or vacuum extraction.

26. Laparoscopy for visualization of pelvic viscera.

27. Laparoscopy for visualization of pelvic viscera; with fulguration of oviducts.

[*]

NEUROSURGERY/NERVOUS SYSTEM

28. Excision, benign tumor; subcutaneous.

29. Neurolysis and/or transposition; median nerve at carpal tunnel.

ORTHOPEDICS/MUSCULOSKELETAL SYSTEM

30. Excision of nail and nail matrix, partial or complete (eg, ingrown or deformed nail) for permanent removal.

31. Reconstruction of nail bed; simple.

32. Reconstruction of nail bed; complicated.

33. Excision of ganglion, wrist (dorsal or volar); primary.

34. Tendon sheath incision for trigger finger.

35. Tenotomy, subcutaneous, single, each digit.

36. Arthrotomy with exploration, drainage or removal of loose or foreign body; metacarpophalangeal joint.

37. Arthrotomy with exploration, drainage or removal of loose or foreign body; interphalangeal joint.

38. Excision of lesion of tendon sheath or capsule (eg, cyst or ganglion).

39. Tenotomy, flexor, single, finger, open, each.

40. Arthroscopy, knee, diagnostic (separate procedure).

41. Arthroscopy, knee, surgical with synovial biopsy.

42. Arthroscopy, knee, surgical, with removal of loose body.

43. Excision of Morton neuroma, single.

44. Tenotomy, open, extensor, foot or toe.

45. Hammertoe operation; one toe (eg, interphalangeal fusion, filleting, phalangectomy).

[*]

46. Hallux valgus (bunion) correction, with or without sesamoidectomy; simple exostectomy (Silver type procedure).

47. Fractures (Colles' type upper extremities, toes, fingers, clavicular fractures, lower extremities, ankle or foot bones, fibula).

UROLOGY/URINARY SYSTEM

48. Cystourethroscopy

49. Cystourethroscopy, with calibration and/or dilation of urethral stricture or stenosis, with or without

meatotomy and injection procedure for cystography, male or female, hospital.

50. Meatotomy, cutting of meatus (separate procedure), except infant.

51. Meatotomy, cutting of meatus (separate procedure), infant.

52. Dilation of urethral stricture by passage of sound, male; initial.

53. Dilation of urethral stricture by passage of sound, male; subsequent.

54. Dilation of urethral stricture by passage of filiform and follower, male; initial.

55. Dilation of urethral stricture by passage of filiform and follower, male; subsequent.

56. Dilation of female urethra including suppository and/or instillation; initial.

57. Dilation of female urethra including suppository and/or instillation; subsequent.

58. Vasectomy, unilateral or bilateral (separate procedure) including postoperative semen examination(s).

ENDOSCOPY

59. Bronchoscopy; diagnostic, rigid bronchoscope.

60. Bronchoscopy; diagnostic, fiberoptic bronchoscope (flexible).

61. Bronchoscopy; with biopsy, rigid bronchoscope.

62. Bronchoscopy; with biopsy, fiberoptic bronchoscope (flexible).

63. Proctosigmoidoscopy; diagnostic (separate procedure) and minor operative procedures.

64. Sigmoidoscopy, flexible fiberoptic; diagnostic and minor operative procedures.

65. Colonscopy, fiberoptic, beyond 25 cm to splenic flexure; diagnostic procedure and minor operative procedures.

66. Colonscopy, fiberoptic, beyond splenic flexure; diagnostic procedure and minor operative procedures.

[*]

RESPIRATORY SYSTEM

67. Excision, nasal polyp(s); extensive, unilateral.

68. Excision, nasal polyp(s); extensive, bilateral.

69. Bronchoscopy; diagnostic, rigid bronchoscope.

70. Bronchoscopy; diagnostic, fiberoptic bronchoscope (flexible).

71. Bronchoscopy; with biopsy, rigid bronchoscope.

72. Bronchoscopy; with biopsy, fiberoptic bronchoscope (flexible).

12. Home Health Care benefits by a home health agency or certified rehabilitation agency for Covered Home Health Services (excluding custodial or housekeeping care).

The maximum weekly benefit shall not exceed the usual and customary weekly cost for care in an extended care facility and benefits shall not be payable for more than 60 visits during any period of 12 consecutive months. A visit under this plan shall be limited to 4 hours in a 24-hour period. The term "home care" means care and treatment of a covered individual under a plan of care established, approved in writing and reviewed at least every 2 months by the attending physician, unless the attending physician determines that a longer interval between reviews is sufficient.

The term "Covered Home Health Services" means the items and services listed below, but only if the attending physician certifies that:

(i) Hospitalization or confinement in a skilled nursing facility would otherwise be required.

(ii) Necessary care and treatment are not available from members of the covered individual's immediate family or other persons residing with the covered individual's immediate family or other persons residing with the covered individual without causing undue hardship.

(iii) The home care services shall be provided or coordinated by a state-licensed or medicare-certified home health agency or certified rehabilitation agency.

List of Covered Home Health Care Items

Part-time or intermittent home nursing care by or under the supervision of a Registered Nurse or a Licensed Practical Nurse (L.P.N.). (In Texas, the Plan will cover service by a R.N. or Licensed Vocational Nurse, L.V.N.)

Part-time or intermittent home health aide services which are medically necessary as part of the home care plan, under the supervision of a registered nurse or medical social worker, which consist solely of caring for the patient.

[*]

Physical, respiratory, occupational or speech therapy.

Medical supplies, drugs and medications prescribed by a physician and laboratory services by or on behalf of a hospital, to the extent such items would be covered under the plan if the individual had been hospitalized.

Nutrition counseling provided by or under the supervision of a registered dietician where such services are medically necessary.

The evaluation of the need for and development of a program, by a registered nurse, physical extender or medical social worker, for home care when approved or requested by the attending physician.

Any of the foregoing items and services which are provided on an outpatient basis, under arrangements made by the home health agency because the items and services cannot be made readily available to the individual at home, not including transportation of the individual to use the outpatient facilities.

Excluding, however, any item or service if it would not be included as an inpatient hospital service under Medicare if furnished to an inpatient of a hospital.

13. Hearing aids prescribed and based on the most recent audiometric examination, and hearing aid evaluations performed by a physician audiologist.

14. Pap smears and routine pregnancy tests, including laboratory and physician's charges.

15. Confinement in private room because of medically necessary quarantine.

16. Initial emergency care by physicians (not including surgery) and hospitals for treatment of accidental injury or life threatening illness.

[*]

Exclusions

"Covered Expenses" does not include charges for or in connection with the following:

1. General health examination, or eye examinations for astigmatism, myopia or hyperopia. (Please refer to Vision Care Plan.)

2. Fitting or cost of eye glasses or hearing aids, except as a result of injury while covered. (Please refer to Vision Care Plan.)

3. The prevention or correction of teeth irregularities and malocclusion of jaws by wire appliances, braces or other mechanical aids, or any other care, repair, removal, replacement, or treatment of the teeth, or surrounding

tissues, except, (a) when necessitated by damage to sound natural teeth or surrounding tissues as a result of an injury which occurs while the employee or dependent, as the case may be, is covered under this benefit, or (b) for the excision of impacted unerupted teeth or of a tumor or cyst, or incision and drainage of an abscess or cyst, or (c) for any other oral surgical procedure not involving any tooth structure, alveloar process, or gingival tissues.

4. Transportation or travel other than local use of ambulance.

5. Injury or disease resulting from war or any act of war, whether declared or undeclared, occurring while covered.

6. Cosmetic Surgery or Treatment except when necessitated by an accidental bodily injury occurring while the employee or dependent is covered.

7. Injury, disease or pregnancy which existed before becoming covered under the Plan unless the charge is for an item received after you (or your Dependent), as the case may be, (a) had been without medical care or treatment, and had not consulted a physician, for such injury, disease or pregnancy for 90 days of continuous employment, provided the 90-day period ended on or after the date you (or your Dependent) became covered or (b) had completed 12 consecutive months of being covered under this Plan, or with respect to charges incurred by you on your own account, unless the charge is for an item received after you complete 6 consecutive months of being both covered under this Plan and actively at work. (This exclusion is waived if you or your dependent were covered under the plan in effect on December 31, 1983 and for a child who became covered on or prior to 15 days of age.)

8. Any item received after the Aggregate Lifetime Maximum Benefit is exhausted and before reinstatement of that benefit.

[*]

9. The calculation of benefits shall not include or be based on any charges for hospital confinement, or any examination, or any surgical, medical or other treatment or any service or supply,

   (a) furnished without recommendation and approval of a physician acting within the scope of his license;

   (b) not medically necessary to the care and treatment of any injury, disease, or pregnancy; except that hospital charges for confinement of a new-born child while the mother is in the same hospital shall not be excluded;

   (c) furnished in connection with an occupational injury or disease;

   (d) furnished by any government or division thereof, except a program for civilian employees of a government;

   (e) if the charge would not have been made in absence of benefits or which you are not legally obligated to pay;

   (f) to the extent the Employer is prohibited by law or regulation from providing benefits for the charge.

10. Charges for hearing aids ordered while covered but delivered more than 60 days after termination of coverage.

11. Charges for hearing aids which are lost or broken unless at time of replacement 3 or more years have lapsed since benefits were last paid by the Plan.

Pre-Determination of Benefits

If, before you agree to undergo a recommended surgical procedure, you wish to obtain a pre-determination of the plan's surgical benefit you should obtain a Pre-Surgical Benefit Determination Form from your employer for you and your

physician to complete. Upon receipt of the form the Claim Processor will pre-determine the benefit and return a copy of the form to you.

[*]

COORDINATION OF BENEFITS

When benefits would be payable under more than one Group Plan, benefits under those Plans will be coordinated as follows:

1. A plan with no provision for coordination of other benefits will be considered to pay its benefits before a plan which contains such a provision.
2. A plan which covers a person other than as a dependent will be considered to pay its benefits before a plan which covers the individual as a dependent.
3. The benefits of a plan which covers the person on whose expenses claim is based as a dependent of a male person shall be determined before the benefits of a plan which covers such person as a dependent of a female person except that in the case of person for whom claim is made on a dependent child,

   (a) when the parents are separated or divorced and the parent with custody of the child has not remarried, the benefits of a plan which covers the child as a dependent of the parent with custody of the child will be determined before the benefits of a plan which covers the child as a dependent of the parent without custody;

   (b) when the parents are divorced and the parent with custody of the child has remarried, the benefits of a plan which covers the child as a dependent of the parent with custody shall be determined before the benefits of a plan which covers that child as a dependent of the step-parent, and the benefits of a plan which covers that child as a dependent of the step-parent to whom the parent with the custody of the child is currently married will be determined before the benefits of a

plan which covers that child as a dependent of the parent without custody.

   Notwithstanding (a) and (b) above, if there is a court decree which would otherwise establish financial responsibility for the medical, dental or other health care expenses with respect to the child, the benefits of a plan which covers the child as a dependent of the parent with such financial responsibility shall be determined before the benefits of any other plan which covers the child as a dependent child.

4. Where 1, 2 and 3 above do not establish the order of payment, the plan under which the person has been covered for the longer period of time will be considered to pay its benefits before the other.

[*]

HOW BENEFITS BECOME PAYABLE

If you (or your Dependent), while covered, incur Covered Expenses as a result of a nonoccupational injury, or a nonoccupational disease or; a female employee (or a dependent wife) while covered incur covered expenses as a result of pregnancy; and the covered expenses exceed the deductible amount in a calendar year benefits become payable.

HOW MUCH IS PAYABLE

After the deductibles are satisfied, 80% of covered charges will be paid. You are responsible for any remaining balance. The deductibles and coinsurance are limited to $1,000.00—Single, and $2,200.00—Family in a calendar year, after which the Plan pays 100% of Covered Expenses incurred during the remainder of that calendar year.

WHO IS ELIGIBLE

All individuals participating in the Plan which was in effect on December 31, 1983, continue to participate in the Plan which becomes effective January 1, 1984.

New employees and their eligible dependents, rehired employees and their eligible dependents become eligible after satisfying the appropriate waiting period.

How To Become Covered

Individuals participating in the Plan on December 31, 1983, may change their status under the Plan if:

- there is a change in martial status;
- there is a change in employment status of the employee or employee's spouse;
- if the status of an employee with single coverage is changed by the addition of an eligible dependent.

Applications must be made within 30 days of the above change.

[*]

Employees not participating in the Plan on December 31, 1983, and employees who elected Single coverage, may apply for enrollment in the Plan or change their status at any time during the period December 1, 1983 through December 31, 1984, with coverage commencing on January 1, 1985.

Employees not participating in the Plan on December 31, 1983, may re-enroll in the Plan prior to January 1, 1985, if:

- there is a change in marital status;
- there is a change in employment status of the employee or employee's spouse;
- they acquire an eligible dependent.

Application must be made within 30 days of the above change.

New hires and rehires must apply for coverage by completing the appropriate forms within 30 days of becoming eligible.

Employees who are not participating in the Plan on December 31, 1983, who do not elect to apply for re-enrollment prior to January 1, 1985, and new hires and rehires who do

not elect coverage within 30 days of becoming eligible may enroll in the Plan if:

- there is a change in marital status;
- there is a change in employment status of the employee or employee's spouse;
- they acquire an eligible dependent.

Application must be made within 30 days of the above change.

When Do Benefits Terminate

Coverage under the Plan terminates on the date you cease active work with your Employer. Exceptions to this are:

(i) sickness or injury where coverage continues indefinitely.

(ii) Leave of Absence—the employee has the option to continue the coverage by paying the appropriate group rate.

[*]

When Do Benefits of a Dependent Terminate

(1) The date your coverage terminates.

(2) On the date the dependent ceases to qualify as a dependent.

Extension of Benefits

If you or your Dependent are wholly disabled on the date coverage under this Plan is terminated, and if charges are incurred as a result of that disabling condition within 1 year after termination and during the continuance of that disability, the benefits shall be payable for the charges so incurred that would have been payable if incurred while covered.

Modification of Provision for Persons Entitled to Medicare Benefits

Active employees, age 65 to 69, and spouses of active employees, age 65 to 69, who elect in writing to be covered under the Company's Plan will not have benefits under this Plan reduced or eliminated by any benefits provided by Medicare.

Each other person who is covered by Medicare under the Social Security Act will be considered to have full Medicare coverage. (The term "full Medicare coverage" means coverage for all of the benefits provided under Medicare, including benefits made available on an optional basis, whether or not the person is enrolled in all portions of Medicare for which he is eligible.)

Any limitation or exclusion contained herein with respect to services or items furnished by or through a government or agency thereof, shall not apply to any services or items for which benefits are provided under Medicare.

[*]

Right of Reimbursement

In the event benefits are paid for charges incurred by an employee as a result of accidental bodily injury or sickness sustained by such employee or any eligible dependents,

(1) The employee shall reimburse the Employer to the extent of such benefit payments (a) out of any recovery by the employee (whether by settlement, judgment, or otherwise) from any person or organization responsible for causing such injury or sickness, or from their insurers, and the Employer shall have a lien upon any such recovery, or (b) if the eligible dependent recovers from the person or organization responsible for causing such injury or sickness, or recovers from their insurers, but in no event shall such employee be required to make reimbursement in an amount exceeding the recovery made from the person

or organization responsible for causing the injury or sickness, or made from their insurers.

(2) The employee or dependent shall execute and deliver such instruments and papers as may be required by the plan and do whatever else is necessary to secure the rights of the plan under (1) above.

It is agreed that the Employer shall have no obligation under this plan to recover such reimbursement from an employee.

[*]

Definitions

"Full-time employee" means only an employee who works at least 40 hours per week.

"Physician" means a person who is duly licensed (1) to prescribe and administer any drugs, or (2) to perform surgical procedures.

"Hospital" means only a licensed hospital which with respect only to the treatment of alcoholism and drug abuse, shall also mean a treatment or residential facility, or a clinic, licensed or approved for the purposes of such treatment. This does not include a hotel, rest home, nursing home, convalescent home, place for custodial care or home for the aged.

"Reasonable and Customary"—Refers to the general level of charges being made by others of similar standing in the locality where the charge is incurred, when furnishing like or comparable treatment, services or supplies to individuals for a similar disease or injury.

"Medically Necessary" means medical treatment which follows good medical practice; is required for the wellbeing of the patient and is prescribed by qualified medical professionals.

"Pre-Admission Testing" means those laboratory tests and/or x-ray examinations which are normally required prior to inpatient surgery or medical treatment for either surgery or medical treatment which is to commence within seven days subsequent to the testing.

"Second Surgical Opinion" means that when a person receives a physician's opinion recommending non-urgent surgery, and before undergoing the recommended surgery, that person obtains a second opinion on the need for such surgery furnished by another physician. The term "non-urgent surgery" refers to surgery which can be postponed without undue risk.

"Home Health Agency" means a licensed public agency or private organization which engages primarily in providing skilled nursing and other therapeutic services under the direction of a physician for care and treatment of injury or disease.

MEMORANDUM FROM W. ZINKEWICH, DATED APRIL 24, 1986 (TRIAL EXHIBIT 47)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

MASSEY-FERGUSON INTERNAL CORRESPONDENCE

From: W Zinkewich *** Date: 86-04-24
To: N D Arnold Copy:
Keith Robson
W Ostapchuk
Reference: Wzink /860424/0159

SUBJECT: SUNSHINE—MCC OFFERS OF EMPLOYMENT (CONFIDENTIAL)

INFORMATION PASSED ALONG TO YOU:

YOU SHOULD RECOGNIZE THAT THE AGREEMENTS CALL FOR MF TO BE RESPONSIBLE FOR ALL TERMINATION COSTS OF EMPLOYEES WHO DECLINE ACCEPTANCE OF THE MCC OFFER OF EMPLOYMENT. MCC OBVIOUSLY WOULD LIKE ALL EMPLOYEES TO SIGN UP, BUT AS YOU ARE LIKELY AWARE, THERE COULD BE MANY EMPLOYEES WHO COULD BE QUITE SKEPTICAL. THEREFORE, I RECOMMEND THAT MF ASSIGNS URGENT REPRESENTATIVE TO THIS PROBLEM. AREAS OF CONCERN ARE WITH FOREMEN ASSOCIATION (INFORMAL UNION) WHERE ALL COULD REFUSE TO SIGN. BILL ZINKEWICH

FROM: J B WELLMAN DATE: 86-04-24, 00:32
TO: E M ARUNDELL

COPIES: IPORT WZINK DAELL RDGAR EDL GGAMB RHAR PWPITT

PRINT HARDCOPY FOR SUSAN FREMES—FRASER & BEATTY

IN CONFIRMATION OF OUR CONVERSATION EARLIER THIS WEEK—THE LOGISTICS OF OFFERING EMPLOYMENT TO EMPLOYEES WHO ARE TO BE TRANSFERRED TO MCC AT FIRST SEEMED RELATIVELY SIMPLE. HOWEVER AS WE GET CLOSER TO ACTUALLY MAKING THE OFFERS SOME PROBLEMS RELATED TO REPRESENTING BOTH MF AND MCC ARE ARISING. I BELIEVE IT ESSENTIAL FOR MF TO DESIGNATE A REPRESENTATIVE TO WHOM QUESTIONS WHICH RELATE TO WHAT MF WILL DO IF THE EMPLOYEES DECLINE EMPLOYMENT WITH MCC CAN BE REFERRED. GARY GAMBACORT,

AN MCC EMPLOYEE, WHO HAS BEEN DESIGNATED AS THE CONTACT FOR EMPLOYEE QUESTIONS CANNOT RESPOND ON MF'S BEHALF TO QUESTIONS LIKE

"IF I REFUSE EMPLOYMENT WITH MCC, FOR ANY REASON:

[*]

- HOW LONG WILL IT BE BEFORE I AM RELIEVED OF MY DUTIES AND OFF THE PAYROLL?
- WILL I QUALIFY FOR THE USUAL SEVERANCE BENEFITS, I.E. SEVERENCE PAY BASED ON LONGEVITY, EARNED VACATION PAY?
- CAN I RETRIEVE MY CONTRIBUTED PENSION FUNDS?
- WHAT WOULD MY STATUS BE: TERMINATED, ACTIVE, ON PAYROLL, OR ON LAYOFF?

IF I AM PRESENTLY ELIGIBLE AS AN MF EMPLOYEE TO RETIRE NOW, DO I HAVE THAT ALTERNATIVE TO ACCEPTING MCC EMPLOYMENT?

THEY ARE ACTUAL EMPLOYEE QUESTIONS WHICH WERE PASSED ONTO US. MANY OF THESE EMPLOYEES WILL INSIST ON KNOWING WHAT MF HAS PLANNED FOR THEM BEFORE THEY WILL BE PREPARED TO COMMIT TO AN OFFER OF EMPLOYMENT WITH MCC.

IT IS TO MF'S ADVANTAGE TO HAVE ALL EMPLOYEES DESIGNATED AS TRANSFERS TO MCC ACCEPT EMPLOYMENT WITH MCC. THE OPPOSITE IS LIKELY TRUE FOR MCC'S POINT OF VIEW. IT THEREFORE, APPEARS THAT IT WOULD BE A CONFLICT OF INTEREST FOR AN MCC EMPLOYEE TO RESPOND ON BEHALF OF MF. IT APPEARS THAT THERE NEEDS TO BE A CLEAR SPLIT OF RESPONSIBILITY IN THIS AREA AND WITH CLOSING SCHEDULED FOR NEXT WEEK THE ISSUE HAS TO BE ADDRESSED URGENTLY.

IT IS ALSO NECESSARY TO REACH A CONSENSUS ON WHAT CONSTITUTES ACCEPTANCE OF EMPLOYMENT WITH MCC IN THE CASE OF AN ACTIVE SALARIED EMPLOYEE PRIOR TO CLOSING.

YOUR COMMENTS ON THE ABOVE WOULD BE APPRECIATED.

REGARDS
JILL WELLMAN

SIDE-BY-SIDE COMPARISON OF BENEFITS
(EXCERPT FROM COMPOSITE TRIAL EXHIBIT "A")

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

LETTERHEAD OF
MASSEY FERGUSON

*Employee Benefit
Program U.S.
Salaried Employees*

In addition to regular compensation, a salaried employee is eligible for the coverage under an extensive benefit program provided by the Company. The following is a brief summary of the major benefits.

Life Insurance

Employees are protected under a basic group life insurance plan entirely paid for by the Company. Employees are covered by insurance equal to one year's earnings (bi-weekly base salary × 26) with additional coverage for eligible commissions and bonuses.

In addition, employees may purchase up to two times annual salary in additional coverage by paying the appropriate premium.

There is also an accidental death provision which provides additional insurance of two and a half times annual salary of $50,000, whichever is greater.

MASSEY COMBINES
CORPORATION

*Employee Benefit
Program U.S.
Salaried Employees*

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In addition, employees may purchase up to two times annual salary in additional coverage by paying the appropriate premium.

There is also an accidental death provision which provides additional insurance of two and a half times annual salary of $50,000, whichever is greater.

Health Benefit Plan

Subject to a monthly employee contribution of

$30.00—Single
$60.00—Family

the Company offers a 5 part benefit plan which is subject to a 31 day waiting period.

—Comprehensive Major Medical Plan
—Prescription Drug Plan
—Dental Plan
—Vision Care
—Hearing Aid

1. *Comprehensive Major Medical Plan*

This plan is subject to cash deductibles of $100 per individual or $200 per family. After the deductibles are satisfied, 80% of covered charges are paid under the plan, subject to annual out-of-pocket maximums of an additional $750 per individual or $1500 per family. There is a lifetime maximum of $250,000 per covered individual. The coverage, which is subject to a pre-existing condition provision, includes:

Hospital Benefits: Hospital board and room charges are paid up to the semi-private rate. Miscellaneous hospi-

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$30.00—Single
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Hospital Benefits: Hospital board and room charges are paid up to the semi-private rate. Miscellaneous hospi-

tal expenses while confined are also provided.

Surgical Benefits: Paid on the basis of the reasonable and customary charges for the particular surgical procedure. There is a mandatory second surgical opinion provision for a specified list of procedures.

Medical Benefits: In-hospital medical is paid on the basis of reasonable and customary charges.

Diagnostic Benefits: Diagnostic x-ray and laboratory expenses will be paid on the basis of reasonable and customary charges for such services.

Maternity Benefits: The Company pays the reasonable and customary fees for prenatal and postnatal care and for delivery, normal baby expenses (excluding well-baby care), and the mother's hospital expenses.

2. *Prescription Drugs*

This prepaid plan covers the cost of eligible drugs subject to a $2.00 deduct-

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[*]

2. *Prescription Drugs*

This prepaid plan covers the cost of eligible drugs subject to a $2.00 deduct-

ible per prescription or refill.

3. *Dental Benefits*:

Subject to certain limitations and co-insurance provisions, dental benefits will be paid in an amount based on the reasonable and customary charge for the dental service, including preventive restorative, prosthodontics and orthodontic treatment.

4. *Vision Care Benefits*

Subject to a schedule and certain limitations, vision care benefits provide coverage for examinations, lenses and frames every 24 months.

5. *Hearing Aid Benefits*

Subject to a schedule and certain limitations, this plan provides coverage for audiometric examinations, hearing aid evaluation tests and one hearing aid once in 36 months when the need is indicated.

Dependent's Benefits

An employee's dependents may be covered subject to satisfying eligibility requirements.

ible per prescription or refill.

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Subject to certain limitations and co-insurance provisions, dental benefits will be paid in an amount based on the reasonable and customary charge for the dental service, including preventive restorative, prosthodontics and orthodontic treatment.

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An employee's dependents may be covered subject to satisfying eligibility requirements.

Disability Benefit Plan

The purpose of this plan is to provide short and long term disability benefits to employees who become disabled as the result of bodily injury or illness.

Tuition Aid

The Company encourages employees to continue their education and training by taking advantage of the Tuition Aid Program which reimburses 80% of tuition fees (excluding books) for approved courses.

Vacations

Employees become eligible for 10 days vacation after 12 months of continuous employment. This increases to 15 days in the third year, 20 days in the tenth year and 25 days in the twentieth year of service.

Holidays

Ten days are observed during the year: New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Day after Thanksgiving, Christmas Eve Day, Christmas Day, and New Year's

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Ten days are observed during the year: New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Day after Thanksgiving, Christmas Eve Day, Christmas Day, and New Year's

Eve Day. In addition, extra days are usually provided during the Christmas shutdown period.

Pensions

The Company's Pension Plan provides for normal retirement at age 65, and optional retirement upon completion of 30 years of credited service. Pension benefits are 100% vested after 10 years service. Service for pension purposes begins on the date of hire.

The Company pays the full cost of the Pension Plan.

Savings Plan

The Savings Plan provides for matched contributions up to a maximum of 6% of regular compensation with an additional 6% in supplemental savings.

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MASSEY COMBINES CORPORATION
QUESTIONS AND ANSWERS
(EXCERPT FROM COMPOSITE TRIAL EXHIBIT "A")

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

LETTERHEAD OF MASSEY COMBINES CORPORATION
225 Henry Street ° Brantford, Ontario ° N3T 5M1

The following are questions and answers which have been prepared in anticipation of many concerns that we, as Massey-Ferguson Industries Limited employees, may have in making the decision to accept the offer of employment from the Massey Combines Corporation. They are not intended to answer all questions which you may have but simply address some of the most obvious concerns which may be raised after you have had the opportunity of viewing the video presentation by Mr. Porter.

Q. 1. What happens if I don't sign the offer of employment letter?

A. 1. We need a signed acceptance to assist us to process a continuation of your salary and benefits through Massey Combines Corporation. Your signature confirms your acceptance of employment as an MCC employee without disruption of either salary or benefits.

Q. 2. What happens if I don't accept employment with MCC?

A. 2. Positions related to the Combines business are part of MCC and, in that regard, it is uncertain whether Massey-Ferguson could offer comparable employment prospects. You would not be eligible for termination benefits from Massey Combines Corporation as you would never have been employed?

Q. 3. What happens to my benefits, pension, etc.?

A. 3. When you transfer to MCC, pay levels and benefit programmes will remain unchanged. There will be no loss of seniority or pensionable service.

Q. 4. Do you expect the terms and conditions of employment to change?

A. 4. Employment conditions in the future will depend on our ability to make Massey Combines Corporation a success and if changes are considered necessary or appropriate, they will be made.

Q. 5. When do I start working for MCC and stop working for MF?

A. 5. Technically, you are working for MCC now. Your acceptance of employment with MCC, however, will be effective as soon as you return the offer letter.

Q. 6. Will we have the option of continuing employment with MF?

A. 6. Massey Combines Corporation cannot speak for MF. We are offering you an alternative employment relationship with a corporation that builds and markets combines. We do know that Massey Ferguson will have no involvement with combine production and we cannot therefore speculate on their staffing requirements.

Q. 7. Will we have the option of transferring back to MF?

A. 7. Massey Combines Corporation is a company totally separate from MF in both operation and staffing requirements. It is uncertain that the type of transfer relationship which existed when MCC was a division of MF, will continue.

Q. 8. Are the pensions protected under MCC?

A. 8. Responsibility for pension benefits earned by employees transferring to Massey Combines Corporation is being assumed by the Massey Combines Corporation Pension Plan.

The assets which are held in the Massey Ferguson Pension Plan to fund such benefits as determined by actuarial calculations, are being

transferred to the Massey Combines Corporation Plan. Such benefits and assets will be protected by the same legislation that protect the Massey Ferguson Pension Plan.

There will be no change in pension benefits as a result of your transfer to Massey Combines Corporation.

TRANSCRIPT OF MESSAGE FROM MR. IVAN PORTER
(EXCERPT FROM COMPOSITE TRIAL EXHIBIT "A")

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

TRANSCRIPT OF MESSAGE FROM MR. IVAN PORTER PRESIDENT—MASSEY COMBINES CORPORATION

Hello, I'm Ivan Porter, President of Massey Combines Corporation. Massey Combines Corporation is a new, stand-alone Company. It is the result of a lot of hard work which started 14 months ago when we established the Combines and Related Equipment Division.

Let's just take a few minutes to review what we've achieved in that time. First, in July 1985, we acquired a range of rotary combines previously manufactured by White Farm Canada Limited. These products will shortly be launched to the market under the Massey brand name. They will enable us to increase sales by competing in a sector of the market from which we have previously been excluded. Second, we are currently implementing a major facilities rationalization program which will consolidate all Engineering, Manufacturing, Marketing and Administrative activities in Brantford. The Engineering group has already moved into a new Research & Development facility on Morton Avenue. Early next year we shall be moving to a new headquarters building currently under construction on Colborne Street. All Manufacturing activities will be consolidated into the Park Road facility. These programs will enable us to reduce costs by approximately 1/3, an essential element in the future success of Massey Combines Corporation, and thirdly, we are currently doing many other exciting things designed to improve the profitability and efficiency of the business, such as, the introduction of innovative methods of Marketing both new and used combines and searching for alternative products to manufacture in the Park Road facility. Later this year we shall be introducing an employee suggestion scheme which will enable you to earn financial rewards by submitting new ideas to help improve the business. All of these activities have been incorporated into a 5 year Business Plan which maps out the way ahead.

It was this Business Plan and our achievements over the last 14 months which gave confidence to our lenders and the governments of Canada and Ontario to support a major

financial restructuring of the Combines & Related Equipment Division. This financial restructuring created Massey Combines Corporation and will provide the funds necessary to ensure its future viability. I believe that with the continued help and support of you we can make Massey Combines Corporation the kind of successful business enterprise which we all want to work for.

Shortly you will be asked to officially confirm your acceptance of employment with Massey Combines Corporation. When you transfer your employment to the Massey Combines Corporation, pay levels and benefit programs will remain unchanged. There will be no loss of seniority or pensionable service. Employment conditions in the future will depend on the success of the Massey Combines Corporation and should changes be deemed appropriate or necessary, they will be made. If you have any questions regarding the transfer of your employment to Massey Combines Corporation, please contact Gary Gambacort, the General Human Resources Manager, located in Brantford.

Finally, despite the depression which persists in the North American economy, I am excited about the future of Massey Combines Corporation. Together we can exploit all available opportunities in the Combines business. I look forward to working with you in the future to ensure the success of Massey Combines Corporation.

Thank You.

LETTER FROM I. PORTER, WITH ONE-PAGE ATTACHMENT, DATED APRIL 30, 1986

(EXCERPT FROM COMPOSITE TRIAL EXHIBIT "A")

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

MASSEY COMBINES CORPORATION
225 Henry Street ° Brantford, Ontario ° N3T 5M1

April 30, 1986

Massey Combines Corporation, is now legally a stand-alone Company.

The creation of this new corporation results from a major financial restructuring of Massey-Ferguson Limited and its subsidiaries and will enable us to realize all available opportunities in the combines business. To enable us to accept you as an employee of Massey Combines Corporation and to continue to process the payment of benefits to you, we require that you complete the information below and return this letter to the Human Resources Department in Brantford. An extra copy is attached for your records.

When you accept employment with Massey Combines Corporation, pay levels and benefit programs will remain unchanged. There will be no loss of seniority or pensionable service. Employment conditions in the future will depend on our ability to make Massey Combines Corporation a success, and if changes are considered necessary or appropriate, they will be made.

We are all very optimistic that our new company, has a bright future, and are excited by the new challenges facing all of us.

Yours very truly,

/s/ I. Porter
I. Porter

[*]

MASSEY COMBINES CORPORATION
225 Henry Street ° Brantford, Ontario ° N3T 5M1

I accept employment with Massey Combines Corporation effective ____________________.

________________ ________________
SIGNATURE DATE

Note: In order to ensure uninterrupted continuation of your pay and benefits, please return this signed acceptance of employment form to the Human Resources Department no later than Monday, May 19, 1986. Offers returned by mail must be postmarked no later than Friday, May 16, 1986.

HANDWRITTEN NOTE FROM IVAN [PORTER] TO VICTOR [RICE], DATED AUGUST 1987 (TRIAL EXHIBIT 80)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

Aug/87

Victor

Reference our discussions last Friday I have given some thought to what you proposed and must admit to being somewhat perplexed by the complexity of two employers, retention bonuses, long term incentive bonuses etc. etc. I have therefore sat down and tried to develop an approach to and timetable for the next twelve months or so based on what already is in place and what we now see as being the most likely course of events. The base documents I have used are your letters dated January 27, 1986/May 8, 1986 (two separate letters), Vince Laurenzo's letter dated March 1987 and our conversation last Friday.

1. *What is currently in place*
   - two year secondment to MCC (Feb. 1, 1986 to Jan. 31, 1988)
   - Base salary Cdn. $165,000—net eligible for currency equalization practice.
   - Short-term incentive equal to 50% of base salary at normative level.
   - Retention bonus Cdn. $150,000. Eligibility Jan. 31, 1988 but only payable if I stay with Varity until at least Jan. 31, 1989.
   - Long term incentive—Varity stock options.
   - Fringe benefits—same as other Varity HQ senior executives.

2. *What is currently forseen to be most likely course of events*
   - IP to stay in MCC until summer of 1988 in order to carry out final rites (i.e. restructure, wind-up, sale) and to ensure Varity exposure is minimized.
   - For internal planning purposes assume IP returns to

[*]

Varity July 1, 1988 accepting that date could advance or extend depending on actual circumstances.

° Varity wish to offer some additional long term retention incentive to IP (stated by VAR to be Cdn. $100,000 payable on Jan. 31, 1991)

The issues that are perplexing me are as follows:

i) With the best will in the world it is impossible at this stage to firmly fix a transfer date back to Varity. The date must be dictated by actual circumstances which given the fragile condition of MCC are impossible to predict right now. Therefore in my view the best approach would be to establish some flexible extension of the secondment arrangement to cover the period Feb. 1, 1988 to date of return to Varity.

ii) it appears illogical to offer IP, at this stage, an additional long term retention incentive. In my view it would be better to offer this at the time IP actually transfers back to Varity. Under the original retention bonus arrangement IP is chained to Varity until Jan. 31 1989 which on current projections is likely to be well after IP returns to Varity. While I am flattered by the offer I want to be sure I have not misunderstood the rationale behind this additional long term retention incentive.

Based on the above I would therefore propose the following for your consideration

[*]

1. Maintain the terms and conditions currently in place through to Jan. 31, 1988.

2. In January 1988 agree a flexible extension to the secondment agreement. In this respect we should let the experts—(Harman) define flexible.

3. At an appropriate time (assume May/June 1988) agree the terms and conditions of new position in Varity. Introduce the long term retention incentive at this point if still considered appropriate in light of whatever overall Compensation package is agreed.

If you are available we can review this after the meeting planned for August 21.

Ivan Porter

[DATE STAMP]
OFFICE OF THE
Aug 12 1987
CHAIRMAN & CEO

LETTER FROM VINCE D. LAURENZO,
TO IVAN PORTER,
DATED NOVEMBER 2, 1987
(TRIAL EXHIBIT 88)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

LETTERHEAD OF VARITY CORPORATION

World Headquarters
595 Bay Street
Toronto, Canada M6G 2C3

Telephone 416-593-3811
Telex 065-24210
Rapifax 416-593-3820

VARITY

STRICTLY PRIVATE & CONFIDENTIAL

November 2, 1987

Mr. Ivan Porter
President
Massey Combines Corporation
Massey House
171 Colborne Street
Suite 201
Brantford, Ontario
N3T 6E1

Dear Mr. Porter:

To recognize your present position at Massey Combines Corporation ("MCC"), we hereby undertake to indemnify you against any personal liability you may incur by reason of your acting in your capacity as President of Massey Combines Corporation and which MCC, because of its difficult financial condition, may be unable to cover.

Paragraph 14 of MCC's by-law No. 1 reads as follows:

> Subject to the provisions of Section 136 of the (Ontario Business Corporation) Act, the Corporation shall indemnify a director or officer, a former director or officer, or a person who acts or acted at the Corporation's request as a director or officer of a body corporate of which the Corporation is or was a shareholder or creditor, and his heirs and legal representatives against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him

in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the Corporation or such body corporate, if (a) he acted honestly and in good faith with a view to the best interests of the Corporation, and (b) in the case [*] of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful. The Corporation shall also indemnify any such person in such other circumstances as the Act of law permits or requires. Nothing in this by-law shall limit the right of any person entitled to indemnity to claim indemnity apart from the provisions of this by-law to the extent permitted by the Act or law.

We undertake that if MCC shall fail or appear to be unable to indemnify you as now provided in the quoted section of its by-law we shall fully and promptly indemnify you to the full extent provided therein, and this will be the case notwithstanding any change made to the text of the by-law.

Yours very truly,

/s/ VINCE D. LAURENZO
Vince D. Laurenzo
President

LETTER FROM VINCE D. LAURENZO TO IVAN PORTER, DATED NOVEMBER 2, 1987 (TRIAL EXHIBIT 89)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 88-1598-E

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on behalf of themselves and as representatives of a class of persons similarly situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, Individually,

Plaintiffs,

—v.—

VARITY CORPORATION and MASSEY-FERGUSON, INC.,

Defendants.

LETTERHEAD OF VARITY CORPORATION

World Headquarters
595 Bay Street
Toronto, Canada M6G 2C3

Telephone 416-593-3811
Telex 065-24210
Rapifax 416-593-3820

VARITY

STRICTLY PRIVATE & CONFIDENTIAL

November 2, 1987

Mr. Ivan Porter
President
Massey Combines Corporation
Massey House
171 Colborne Street
Suite 201
Brantford, Ontario
N3T 6E1

Dear Mr. Porter:

This letter refers to my letter to you of the same date concerning Varity's indemnification of you as an officer of MCC.

All elements of that letter apply. In addition, the following is required as an integral part of that letter.

The aforementioned letter is to be treated as a confidential document and is not to be divulged in any manner at any time to anyone without the mutual written consent of the writer and the recipient.

Yours very truly,

/s/ VINCE D. LAURENZO
Vince D. Laurenzo
President

I hereby acknowledge receipt of the this letter, accept it, and agree to abide by the restrictions set forth in it.

Nov. 27 1987	/s/ IVAN PORTER
Date	Ivan Porter

(4)

No. 94-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONER

Floyd Abrams*
80 Pine Street
New York, New York 10005
(212) 701-3000

* *Counsel of Record for Petitioner*

Of Counsel:

Thomas J. Kavaler
Howard G. Sloane
Katherine B. Harrison
David G. Januszewski
Jonathan Sherman
Cahill Gordon & Reindel
(a partnership including a professional corporation)

William J. Koehn
Deborah M. Tharnish
Davis, Hockenberg, Wine, Brown, Koehn & Shors

June 23, 1995

QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act ("ERISA") § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), permit individual ERISA plan participants and beneficiaries to sue on their own behalf, and not on behalf of an ERISA plan, for alleged breaches of fiduciary duty under ERISA?

2. When an ERISA-governed welfare benefits plan expressly reserves the right to terminate, amend or modify the plan, and when that reservation of rights is disclosed to plan participants and beneficiaries, may liability nonetheless be imposed under ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. V 1993), for breach of fiduciary duty, where an employer fails to disclose its expectation that at some point in the future benefits will be terminated?

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TABLE OF AUTHORITIES

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Judicial Code

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1471

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (PA 1a-21a)[1] is reported at 36 F.3d 746. The court's opinion granting petitioner's

[1] References to "PA __" are to the appropriate pages of the Appendix to the Petition for a Writ of Certiorari. References to "JA _" are to the appropriate pages of the Joint Appendix. References to "Tr. _" are to the appropriate pages of the trial transcript. References to "D. _" are to docket entries in the district court.

motion for clarification of its initial opinion (PA 22a-23a) is reported at 41 F.3d 1263. The district court opinions on post-trial motions (PA 24a-115a) are unreported. A prior opinion of the court below in this case (PA 116a-124a) is reported at 896 F.2d 1107. The court's denial of rehearing with suggestion for rehearing *en banc* is unreported. (PA 125a)

JURISDICTION

Petitioner seeks reversal of the ruling of the court of appeals (PA 1a-21a) filed on September 29, 1994, and clarified on December 8, 1994. (PA 22a-23a) The court of appeals denied a timely petition for rehearing with suggestion for rehearing *en banc* on December 5, 1994. The Petition for a Writ of Certiorari was filed on March 6, 1995, and was granted on April 24, 1995.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

Relevant portions of ERISA are set forth at PA 126a-149a, and are listed in the Table of Contents thereto.

STATEMENT OF THE CASE

This case is about a company that went bankrupt, causing plaintiffs to lose their retiree health benefits. Plaintiffs responded by commencing, for themselves and not for an ERISA plan, an action which ultimately resulted in their being awarded past and future health benefits to which both courts below acknowledged they were not entitled under the written ERISA plan terms.

Factual Background

The litigation arose out of the demise of Massey Combines Corporation ("MCC"), a manufacturer of combines and other farm equipment machinery that went into receivership in Canada in 1988. MCC was created in 1986 when Massey-Ferguson Inc. ("MF"),[2] a farm equipment manufacturer, spun off its Combines and Related Equipment ("CARE") division into a separate company. Respondents are a class of approximately 83 plaintiffs who retired from MCC's United States' operation between 1986 and 1988 and ten individual plaintiffs who retired from MF prior to 1986 whose health benefits were transferred to MCC with other CARE division obligations in 1986. In February 1988, when MCC went into receivership, plaintiffs lost the ERISA welfare benefits MCC had provided. In October 1988, plaintiffs brought this action on behalf of themselves—not on behalf of an ERISA plan—against MF and Varity.

The Applicable Benefits Documents. Prior to 1986, as employees or retirees of MF, plaintiffs were provided welfare benefits pursuant to the MF Benefits Plan (the "Master Plan"). (JA 5-26) Section 7.4 of the Master Plan states unambiguously: "The Company hereby reserves the right, by action of the Board, to amend or terminate the Plan or Trust at any time . . . ." (JA 18)

From the 1970s to 1981, MF provided its employees with a booklet entitled "You and Massey-Ferguson" ("*You & MF*"), which served as a Summary Plan Description ("SPD")[3] for welfare benefits during those years. (PA 66a ¶¶ 71-74) *You &*

[2] MF, formerly a subsidiary of petitioner Varity Corporation, has been merged into Varity and no longer exists as a separate corporate entity. A statement pursuant to Rule 29.1 of the Rules of this Court is set forth at page iii of the Petition for a Writ of Certiorari. That statement is still accurate.

[3] *See* ERISA §§ 102 *et seq.*, 29 U.S.C. §§ 1022 *et seq.* (1988 & Supp. V 1993); Pension and Welfare Benefits Admin. Regs., 29 C.F.R. §§ 2520.101-1 *et seq.* (1994), as amended.

MF stated at various places that benefits "will continue" in retirement but did not promise unchanged medical benefits and did not "vest" medical benefits in retirement. (PA 9a)

In December 1983, MF announced a significant cutback in the health benefits that it provided to employees and retirees. At that time, MF changed its health coverage from the first dollar coverage described in *You & MF* to a Comprehensive Major Medical Plan (the "CMMP") effective January 1, 1984. (JA 28)[4] In December 1983, MF advised all employees and retirees of the change (JA 31-34, 35-39), and distributed to employees and retirees a detailed memorandum (the "1984 CMMP Memo") describing the new coverage. (JA 39-62; PA 74a ¶ 90)[5]

The CMMP reduced health benefits, requiring higher deductibles and introducing coinsurance. (PA 74a ¶ 90) In addition, the 1984 CMMP Memo made plain that the change in benefits affected not only current employees but also people who had already retired, by stating in the second item (after the "effective date") that retirees, as well as current employees, were included in the "eligible class." (JA 40) Finally, the 1984 CMMP Memo dealt explicitly with the possibility of future changes and MF's unqualified right to make such changes: The 1984 CMMP Memo stated on its schedule of benefits, at the bottom of its second page, in solid capital letters:

> "THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES

[4] Earlier reductions to MF benefits dated back to 1981. (PA 73a-74a ¶¶ 87-89)

[5] The 1984 CMMP Memo is set forth in full at JA 39-62, as an attachment to a December 12, 1983 memorandum sent to employees. (JA 35-39) The 1984 CMMP Memo was also attached to a memorandum sent to retirees (JA 31-34), advising them of the change. (*See* JA 33 ("Full details are attached."))

> OF COVERED INDIVIDUALS AT ANY TIME." (JA 43)[6]

The Decline of the Farm Equipment Machinery Industry in the 1980s and the Creation of MCC. The district court found that "[s]tarting in 1982, there began an unprecedented decline in the sales of combine harvesters in North America, caused in significant part by an extreme depression in this country's agricultural economy." (PA 53a ¶ 12) As the courts below concluded, "[t]he year 1986 was the all-time low for sales of self-propelled combines" (PA 2a); "the entire combine industry was in dire straits." (PA 43a)[7]

Though other divisions of Varity were still profitable, the CARE division suffered significant losses in 1984 and 1985. (PA 53a ¶¶ 13,14) Plaintiffs' expert at trial acknowledged that given the state of the economy, the chances of saving the CARE Division as part of MF under any scenario were very small. (Tr. 3040) The failure of the CARE division threatened to put Varity into breach of its debt covenants. (PA 53a ¶ 14) As the district court found, "Varity's financial position in early 1985 was very precarious." (*Id.*) At trial, plaintiffs' expert agreed that "it would have been very difficult for [Varity] to have survived with the CARE Division. . . . Bankruptcy was a clear possibility." (Tr. 3024-25) Indeed, plaintiffs' expert adopted his earlier statement that "the correct economic decision was to get the hell out of the combine business." (Tr. 3025)

Faced with this economic reality, Varity began to consider the creation of MCC, a separate corporation comprised of

[6] The 1984 CMMP Memo, as the district court found (PA 74a-75a ¶ 92), constituted a summary of material modifications within the meaning of ERISA. *See* ERISA § 102(a), 29 U.S.C. § 1022(a) (1988).

[7] These financial problems affected every United States company in the combine (and related machinery) business (Tr. 2624), and ultimately caused many of those companies to go out of business or to engage in significant corporate restructurings. (Tr. 2626)

MF's CARE division.[8] On May 6, 1986, MCC went into operation as a private Canadian company, ownership of whose stock was divided between Varity, a Canadian bank and the Canadian government. (PA 58a ¶35) As plaintiffs' expert acknowledged, the restructuring "saved" Varity (Tr. 3034) and with it the jobs and benefits of 17,500 Varity employees, who were not employed in combines-related businesses. (Trial Exhibit 357)

MCC's Offer of Employment to MF CARE Division Employees. When it was created in 1986, MCC offered employment to all MF CARE division employees on the same terms as MF had provided. Employees were told the following:

> "When you accept employment with Massey Combines Corporation, pay levels and benefit programs will remain unchanged. There will be no loss of seniority or pensionable service. Employment conditions in the future will depend on our ability to make Massey Combines Corporation a success, and if changes are considered necessary or appropriate, they will be made." (JA 82)

A videotaped presentation by MCC's president conveyed the same message. (JA 78-80) MCC also provided employees with a side-by-side chart comparing benefits at MF with those at MCC. That chart specifically referenced the CMMP and asserted that the benefits offered at both companies were identical. (JA 67-73) Finally, MCC provided employees with a question and answer sheet which stated that benefit programs would "remain unchanged" at MCC but that if changes in employment conditions were considered "necessary or appropriate, they will be made." (JA 75-76)

[8] Plaintiffs' expert testified that the only other possibilities were to close the CARE division and liquidate the assets (Tr. 2974), which, of course, would have immediately cost plaintiffs their jobs and benefits, or to sell the CARE division to another company. The expert also testified that "nobody, in my opinion, would have bought the combine division." (*Id.*)

The Benefits Provided By MCC. MF CARE division employees who accepted the offer of employment with MCC thus went to the new company with the understanding that they would receive the same benefits package they had received the day before from their former employer. As fully disclosed to all affected employees, the CMMP had cut benefits for employees and retirees, and the summary of that CMMP had warned both groups of the possibility of further future changes and or termination of benefits in its reservation of rights. The health benefits MCC provided were, in fact, identical: MCC adopted the MF Master Plan and the CMMP as its own and provided the specified benefits while it existed. (PA 76a ¶98)[9] Thus, all employees and retirees of MCC (as well as the ten MF retirees whose benefits were transferred to MCC) were governed by the terms of the CMMP as to coverage as well as the reservation of rights that had been fully disclosed in December 1983, long before MCC was even created.

MCC Receivership and the Attendant Loss of Benefits. On March 4, 1988, almost two years after its formation, MCC went into receivership in Canada. (PA 6a) It was forced to terminate its employees, and MCC's receiver sent notice to all MCC employees and retirees advising them that MCC no longer had funds to continue to pay welfare benefits. (PA 52a ¶10, 117a)

No Other Representations as to Benefits. From the beginning, there have been disputed facts as to the information provided to MF employees about MCC's future business prospects. The district court concluded that overly optimistic statements were made to employees about MCC's future prospects and insuf-

[9] There is no dispute on this point. The district court found that after the creation of MCC "Varity began to develop 'creative and innovative ways' to reduce employee benefits." (PA 64a) But aside from a reduction in severance pay at MCC that is no longer relevant in this case, the record is clear that MCC did provide the health benefits program MF had offered prior to MCC's creation. It is also clear that Varity was fully entitled under ERISA totally to cut off, let alone reduce, employee health benefits. *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1228 (1995).

ficiently pessimistic statements made about MCC's then-current financial picture. (PA 63a-65a) What is not in dispute is what plaintiffs were told about what their benefits were while at MF and what they would be when they went to MCC. The courts below agreed that the official ERISA plan documents did not provide vested or lifetime welfare benefits. (PA 9a, 35a) There is no finding in this case of any oral or informal written representation or promise that health benefits would continue "for life" or "forever"—either at MF or at MCC. There is no allegation that anyone at Varity represented that health benefits would last any particular length of time at all. And there is no dispute that the reservation of rights was disclosed to all plaintiffs before they lost their benefits.

Procedural History of This Action

A. Initial Proceedings

On October 26, 1988, five former MCC employees initiated this action against MF and Varity under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1988 & Supp. V 1993), as amended, in the United States District Court for the Southern District of Iowa. (JA 1; D. 1) Jurisdiction was predicated upon ERISA § 502, 29 U.S.C. § 1132 (1988 & Supp. V 1993) and 28 U.S.C. § 1331 (1988). Plaintiffs sought (i) a permanent injunction ordering MF and Varity to provide a purported class of plaintiffs, consisting of retirees of MCC who had previously worked for MF, with lifetime welfare benefits; (ii) severance pay for certain former employees of MF who worked for MCC at the time it was placed into receivership; and, (iii) punitive damages.

MF and Varity moved to dismiss the complaint, and plaintiffs cross-moved for a preliminary injunction with respect to the retiree plaintiffs' claim for vested welfare benefits. (JA 1; D. 20, 21, 24) On July 14, 1989, the district court issued an order denying the motion to dismiss and granting the motion for a preliminary injunction. (JA 1; D. 47) The preliminary

injunction was reversed by the Court of Appeals for the Eighth Circuit on February 15, 1990, and the case remanded to the district court. (PA 116a-124a)

In its 1990 opinion, the court of appeals did not limit itself to a review of whether the district court had abused its discretion in granting the injunction, but proceeded to "reach the legal issues at the heart of the case." (PA 119a n.3) Welfare benefits plans under ERISA, the court held, may be modified or terminated absent the employer's contractual agreement to the contrary, and plaintiffs had the burden of demonstrating a promise to vest welfare benefits. (PA 119a-120a) "[T]he mere fact that employee benefits continue in retirement does not indicate that the benefits become vested for life at the moment of retirement. No inference of an intent to vest can be presumed from the fact the benefits are retirement benefits." (PA 120a) Because the plan documents at issue contained no promise of vested benefits, and contained a reservation of the right to amend or terminate the benefits, the court held that the retirees "are no longer entitled to these benefits." (PA 121a)[10]

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[10] Following the court of appeals' 1990 decision, MF and Varity moved for summary judgment as to all plaintiffs based on the Eighth Circuit's ruling that the retiree plaintiffs were no longer entitled to benefits and based on the governing severance pay plan documents establishing that the severance pay plaintiffs also were not entitled to benefits. The district court initially granted summary judgment in favor of MF and Varity as to the claims of the retiree plaintiffs but, professing confusion as to the meaning of the court of appeals' decision, certified its ruling for interlocutory review. (JA 1; D. 171) The court of appeals denied plaintiffs' application for interlocutory review. (*See* JA 2; D. 184)

Despite having twice failed to persuade the court of appeals of their entitlement to lifetime benefits, plaintiffs moved the district court to reconsider that portion of the order granting summary judgment to the retiree plaintiffs, arguing that the district court's granting of summary judgment did not reflect the court's actual views on the merits, but had been occasioned solely by the court's desire to facilitate interlocutory review. (JA 2; D. 187) The district court agreed; it reversed that portion of its order granting summary judgment as to the retiree plaintiffs' claims of lifetime benefits, allowing those claims to proceed to trial. (JA 2; D. 205)

B. Trial

The district court thereafter allowed two plaintiff classes (MCC retirees and former MCC employees seeking severance pay) and ten individual retirees (who had retired from MF prior to the formation of MCC) to proceed to trial in August 1991 on five legal theories: breach of contract, promissory estoppel, interference with protected rights, breach of fiduciary duty and fraudulent misrepresentation. After a seventeen-day trial, a jury found for plaintiffs on all claims and awarded plaintiffs almost $46 million, including $36 million in punitive damages.[11] Judgment for $45,848,499 was entered on September 30, 1991. (JA 2; D. 356)

C. Post-Trial Orders of the District Court

On March 26, 1993, the district court entered an Order (the "March 1993 Order") and separate Findings of Fact and Conclusions of Law (the "March 1993 Findings"). The district court struck entirely the punitive damage award, acknowledging that punitive damages are not available under ERISA. (PA 113a) The court set aside the jury's award to the severance pay class on all claims—including breach of fiduciary duty (PA 97a-100a)—based on the governing plan documents. As to the retirees, the court dismissed their breach of contract claim seeking lifetime benefits pursuant to ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1) (1988). The court determined that "[f]or plaintiffs to recover under this count they must show a contract for lifetime benefits which can not be

[11] The district court allowed a jury trial despite the clear caselaw barring jury trials in ERISA cases, *e.g.*, *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982), law reaffirmed by the court of appeals. (PA 7a n.2) Moreover, the district court allowed the jury to consider evidence relevant to punitive damages, notwithstanding clear caselaw barring recovery of such damages in ERISA cases, *e.g.*, *Dependahl* v. *Falstaff Brewing Corp.*, 653 F.2d 1208, 1216-17 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). After trial the district court set aside the punitive damages award (PA 113a), a ruling affirmed by the court of appeals. (PA 10a-11a)

terminated. They cannot make such a showing in the face of section 7.4 [the reservation of rights in the Master Plan]." (PA 35a) The court also dismissed as preempted the retirees' claim of fraudulent misrepresentation. (PA 45a)

The district court held, however, that the retiree plaintiffs were entitled to lifetime welfare benefits under three different legal theories. First, the court held that Varity had breached its fiduciary duties in failing to provide lifetime welfare benefits. (PA 89a-97a) The court so held even though the plaintiffs had established no contractual right to recover such benefits under § 502(a)(1) (PA 35a), and even though it had set aside the fiduciary duty claim of those plaintiffs seeking severance pay, based upon the absence of a contractual right in the severance pay plan documents. (PA 97a-100a) Second, the court held that Varity had violated ERISA § 510, 29 U.S.C. § 1140 (1988), which bars interference with the attainment of ERISA-protected rights. (PA 38a-41a) Finally, the court held that petitioner was equitably estopped under federal common law from denying the retiree plaintiffs lifetime welfare benefits. (PA 100a-112a)

In the March 1993 Order, the district court offered the retiree plaintiffs the option to elect either (i) a permanent injunction reinstating them into the MF Plan and "compensatory damages" totalling $779,007.00 (amounting to "actual expenses" borne by the retiree plaintiffs); or, (ii) $8,312,332.00 equalling "damages past and future"—in other words, the equivalent of lifetime benefits—awarded by the jury. (PA 47a, 114a-115a) On April 15, 1993, plaintiffs elected the jury's award of money damages. (JA 3; D. 407)

The Opinion of the Court Below

On appeal, the court below affirmed the district court's March 1993 Order and March 1993 Findings, with some modification as to relief.[12]

[12] The court below set aside the award of compensatory damages for lifetime benefits (elected by the retiree plaintiffs), and substituted for

The court rejected the retiree claims for lifetime benefits under ERISA § 502(a)(1) because "[the plan] language unambiguously confers on the company the right to amend or terminate the Plan." (PA 9a) Nevertheless, the court affirmed the district court's finding of liability as to retirees on the grounds that Varity had breached its fiduciary duties under ERISA § 404(a)(1), 29 U.S.C. 1104(a)(1) (1988 & Supp. V 1993). (PA 17a) The court did this even as it agreed that the severance pay plaintiffs could not sustain their claims (including breach of fiduciary duty) because "[t]he employees' attempt to recover MCC severance benefits from Varity has no support in the language of the [plan document]." (PA 10a)[13]

In three brief paragraphs, the court held that Varity had violated its fiduciary duties to the plaintiffs by misleading them as to the likely future financial viability of MCC. Because Varity itself knew that "MCC had a negative net worth on the day it was created" (PA 5a), and because " '[a]ll of MCC's officers . . . agreed that MCC's chances of survival were not good' " (PA 6a), the court held that the failure to disclose those facts together with the failure to restate that, at some point in the future, the plan might be modified or terminated

it the alternative that plaintiffs had not chosen, and which was not part of the judgment entered by the district court: monetary relief "in the nature of restitution" as well as an injunction reinstating plaintiffs in the MF benefit plan. (PA 18a-19a) Judge Hansen dissented from the panel's opinion on this point, writing that because plaintiffs had elected damages rather than injunctive relief in the district court, the panel had ruled on an issue the parties had not appealed or briefed. (PA 19a-20a) Judge Hansen also dissented based on his view that the restitution ordered by the court for past benefits was an affirmance of the compensatory damages awarded by the district court and thus not properly considered "other appropriate equitable relief" within the meaning of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988). (PA 20a-21a)

[13] The court did not reach the district court's findings of liability predicated upon interference with protected rights and equitable estoppel. (PA 17a-18a n.5)

(PA 4a-5a), was a breach of Varity's fiduciary duties to plaintiffs. (PA 12a-13a, 17a)

The court was less than clear as to exactly why this behavior constituted a violation of *ERISA* fiduciary duties. The court acknowledged that under ERISA "not every business decision made by a fiduciary will subject it to liability for breach of fiduciary duty, even though the decision may detrimentally affect the prosperity of the company, the assets of the plan, or the interests of plan beneficiaries." (PA 12a-13a) The court further acknowledged that Varity's "decision to create MCC and to transfer certain assets to it . . . was not by itself a violation of ERISA." (PA 13a) Starting, however, with the proposition that "the conduct [Varity] engaged in . . . was a breach of fiduciary duty in the generic sense" (PA 12a), the court—without explanation—asserted that Varity's conduct went "beyond mere business decisions." (PA 13a)

The court was silent as to why this was so. It acknowledged that plaintiffs could not recover lifetime benefits (or any benefits) under ERISA § 502(a)(1) because the plan terms unambiguously did not establish any such contractual obligation. (PA 9a) It did not dispute—or even so much as mention—that the reservation of right to amend, modify or terminate the plan had been disclosed to employees and retirees in the 1984 CMMP Memo, a fact found by the district court. (*see* PA 74a-75a ¶¶ 90-92) Nor did the court mention the 1986 documents informing MF employees that "if changes are considered necessary or appropriate, they will be made." (JA 76, 82) Nor, in fact, did the court identify any oral or written misrepresentations as to the terms of the benefit plans or any violations of ERISA's reporting and disclosure provisions. Rather, the court simply invoked the talismanic phrase "duties of loyalty and prudence" to determine that Varity's failure to disclose the likely future business prospects of MCC to its employees and to redisclose the reservation of rights it had previously disclosed in 1984 had constituted " 'misleading communications to plan participants regarding plan administration . . . .' "

(PA 13a, quoting *Berlin* v. *Michigan Bell Telephone Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988).)

Having determined that a breach of fiduciary duty had occurred, the court then held that plaintiffs were entitled under ERISA to recover on their own behalf for that breach. The court located this remedy in ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), allowing participants and beneficiaries to obtain "other appropriate equitable relief." (PA 16a)

The court determined that ERISA § 404(a)—which sets forth the nature of the duties owed by fiduciaries—could itself provide a claim for a breach of those duties. In so ruling, the court failed to address the impact on this case of this Court's analysis in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 140-42 (1985), which determined that ERISA establishes fiduciary duties for the benefit of plans and that a claim for liability for breach of those duties, and the remedies therefor—which are explicitly provided under a separate provision in the statute, ERISA § 409, 29 U.S.C. § 1109 (1988)—can only be brought by a participant or beneficiary on behalf of a plan. Adopting instead "the reasoning in Justice Brennan's concurring opinion in *Russell*" (PA 15a), the court concluded that " '[a] beneficiary therefore may obtain "appropriate equitable relief" whenever an administrator breaches the duties set forth in section 404(a) [29 U.S.C. § 1104(a)].' " (PA 15a, quoting *Russell*, *supra*, 473 U.S. at 153-54 (Brennan, J., concurring in the judgment))[14]

[14] The court below rejected plaintiffs' cross-appeal seeking reversal of the district court's order setting aside the award of punitive damages, the jury's finding of liability as to the severance pay plaintiffs, the jury's finding that petitioner had breached its "contract" to pay benefits pursuant to § 502(a)(1), and the jury's finding of fraudulent misrepresentation. (PA 8a-11a) Plaintiffs have not sought further review of that ruling.

SUMMARY OF ARGUMENT

ERISA, the federal statute resulting from "almost a decade of studying the Nation's private pension plans," *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980), reflects a multitude of careful and deliberate choices by Congress. Among them were decisions as to who may sue to challenge what kind of conduct and the remedies available to aggrieved parties. In this case, the court of appeals abandoned both the text and structure of ERISA, upsetting the carefully crafted balance struck by Congress.

First, by holding that plaintiffs could maintain this suit and could recover benefits for themselves and not on behalf of a plan for breach of fiduciary duty, the court below avoided the text of ERISA and caselaw from this Court interpreting the statute under which recovery for such a breach must be plan-based. In *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), this Court determined that a plaintiff may bring a civil action for breach of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988), only on behalf of an ERISA plan, not individually. That ruling was based on the Court's determination that § 409 of ERISA, entitled "Liability for breach of fiduciary duty", which is specifically enforceable through § 502(a)(2), allows only plan-based remedies.

The court below nonetheless permitted plaintiffs in this action to recover on their own behalf for breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), which allows recovery of "appropriate equitable relief" for violations of the statute. By allowing plaintiffs to bypass that portion of the statute that expressly addresses the remedies available for breach of fiduciary duty, § 409, via the more general language of § 502(a)(3), the court effectively—and impermissibly—read the plan-based limitation of remedies in § 409 and its enforcement mechanism, § 502(a)(2), out of the statute.

Second, by holding Varity liable for a breach of fiduciary duty in failing to tell plaintiffs of its expectation that their welfare benefits would be terminated at some point in the future, notwithstanding that Varity had already told plaintiffs that it had reserved the right to amend or terminate those benefits, the court vastly expanded the scope of fiduciary obligations on employers beyond those imposed by the statute. The court of appeals' ruling places fiduciary obligations on employers acting in the course of business decisions and not "plan administration", contrary to the statute's definition of "fiduciary", and creates new disclosure responsibilities, not found anywhere in those portions of ERISA that address disclosure obligations. By refusing to give effect to the fully disclosed reservation of rights in the official ERISA welfare plan documents, the ruling renders meaningless ERISA's comprehensive reporting and disclosure scheme under which beneficiaries rely upon written plan documents and specified disclosures, and eviscerates the careful distinction built into the statute between pension benefits which vest and welfare benefits which are terminable at any time.

ARGUMENT

I.

ERISA DOES NOT ALLOW INDIVIDUAL PLAN PARTICIPANTS OR BENEFICIARIES TO SUE ON THEIR OWN BEHALF FOR BREACH OF FIDUCIARY DUTY

The threshold issue in this case is whether ERISA affords a cause of action to individual plan participants and beneficiaries to sue on their own behalf for breach of ERISA-imposed fiduciary duties. The court of appeals held that it does. The court reasoned that since ERISA affords individual participants and beneficiaries the right to sue for "other appropriate equitable relief" under ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3) (1988), plaintiffs could assert claims for breach of fiduciary duty under ERISA § 404(a), 29 U.S.C.

§ 1104(a) (1988 & Supp. V 1993), not on behalf of the plan itself, but instead on their own behalf and solely for their own benefit. (PA 14a-16a)

The fatal flaw in the ruling below begins with the court of appeals' refusal to recognize that this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), should be held applicable to *all* claims for breach of fiduciary duty. In *Russell*, this Court held that claims for liability for breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109 (1988), could be brought by beneficiaries only on behalf of a plan through § 409's corresponding enforcement provision, ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988). Although *Russell* did not address § 502(a)(3), its analysis of the nature of fiduciary duties under ERISA and the remedies provided by Congress for breaches of those duties compels the conclusion that in enacting ERISA, Congress—quite deliberately—chose to enact a specific liability and remedial provision for a fiduciary's breach of duty, § 409, and chose with equal deliberation to provide an equally specific mechanism for obtaining civil redress for the wrongs caused by the breaches, § 502(a)(2).

ERISA, this Court has observed time and again, is a " 'comprehensive and reticulated statute,' " *Russell*, *supra*, 473 U.S. at 146 (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)), designed to assure that plan participants and beneficiaries will receive expected benefits, while at the same time recognizing the costs imposed by such regulation as well as the need to encourage employers to offer benefits in the first place. *See Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987).[15] In balancing these inter-

[15] As the House Committee on Education and Labor stated, ERISA "represents an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations." H.R. Rep. No. 533, 93d Cong., 1st Sess. 9

ests, Congress set forth in subchapter I of the statute comprehensive reporting and disclosure requirements, fiduciary obligations, participation, vesting and accrual regulations, substantive rights barring interference with ERISA-protected rights, and, subsequently, imposed certain regulations regarding the continuation of health care coverage after an employee ceased his or her employment.

Congress specifically chose to address ERISA fiduciary issues in Part 4 of Title I of the statute, entitled "FIDUCIARY RESPONSIBILITY". ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (1988 & Supp. V 1993), as amended. Part 4 contains ERISA § 404, 29 U.S.C. § 1104 (1988 & Supp. V 1993), entitled "Fiduciary duties". Subsection (a) of that provision sets forth the "[p]rudent man standard of care" under which the fiduciary is required to discharge his or her duties. ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. V 1993). In *Russell*, this Court determined that while the obligations set forth in § 404(a) are "to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan[,] . . . the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." 473 U.S. at 142-43; *accord Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063, 2066 (1993).

In addition to setting forth these duties, Part 4 of ERISA includes a specific provision, ERISA § 409(a), 29 U.S.C. § 1109(a) (1988), which renders fiduciaries liable for breach of their duties, and provides a particular set of remedies for those breaches. Section 409, unambiguously captioned in the statute "**Liability for breach of fiduciary duty,**" provides:

(1973), *reprinted in* Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. *Legislative History of the Employee Retirement Income Security Act of 1974* ("Leg. Hist.") 2348, at 2356 (1976).

> "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title."[16]

ERISA § 409(a), 29 U.S.C. § 1109(a).

In addition to establishing liability for breach of fiduciary duty and the remedies therefor, ERISA sets forth a mechanism that provides the right to initiate civil suits to impose the liability and obtain the remedies set forth in § 409. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988), provides that "[a] civil action may be brought . . . by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 [409] of this title." Section 502(a)(2), as originally enacted, was one of six provisions found in § 502(a) of the statute "empower[ing]" particular persons to bring civil actions under a variety of circumstances.[17] In *Russell* this Court referred to these as "carefully integrated civil enforcement provisions," and noted that they are part of "ERISA's interlocking, interrelated, and inter-

16 Section 411 prohibits any person who has been convicted of certain offenses from serving as an administrator or fiduciary of a plan. ERISA § 411, 29 U.S.C. § 1111 (1988).

Part 4 of ERISA also includes a second "liability" provision, which addresses "[l]iability for breach of a co-fiduciary". ERISA § 405, 29 U.S.C. § 1105 (1988).

17 Since *Russell* was decided, § 502(a) has been amended to provide three additional types of enforcement actions. (The full text of § 502(a) is set forth at PA 148a-149a.)

dependent remedial scheme." *Russell, supra*, 473 U.S. at 146.[18]

Section 409, as enforced through § 502(a)(2), is part of that same "remedial scheme", and its meaning has been settled for a decade. This Court held in *Russell* that under § 409, a participant or beneficiary cannot recover individually, but only on behalf of a plan. There, plaintiff had received all the benefits to which she was entitled under the terms of a plan, but sought damages for the injuries she had suffered due to an administrator's delay in processing her claim for benefits. Asserting that the administrator had breached its duty of care set forth in § 404(a) in delaying to pay her benefits, *see Russell* v. *Massachusetts Mutual Life Insurance Co.*, 722 F.2d 482, 488 (9th Cir. 1983), she brought an action under §§ 409 and 502(a)(2) for breach of fiduciary duty. This Court reversed the Ninth Circuit's determination that she could bring the cause of action on her own behalf.

In so holding, this Court looked to the text of § 409:

> "[W]hen the entire section [409] is examined, the emphasis on the relationship between the fiduciary and the plan as an entity becomes apparent. Thus, not only is the relevant fiduciary relationship characterized at the outset as one 'with respect to a plan,' but the potential personal liability of the fiduciary is to 'make good *to such plan* any losses *to the plan* . . . and to restore *to such plan* any profits of such fiduciary which have

[18] This Court repeatedly has noted that Congress's choices of the specific remedies set forth in § 502(a) were particularly deliberate and careful. "The detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Pilot Life, supra*, 481 U.S. at 54; *see Mertens, supra*, 113 S. Ct. at 2066-67.

> been made through use of assets *of the plan*. . . .' "

473 U.S. at 140 (emphasis in original). The Court's *Russell* analysis, however, was not confined to the text of § 409. It also looked to the "statutory provisions defining the duties of a fiduciary, and the provisions defining the rights of a beneficiary." *Id.* After reviewing these provisions, as well as combing the legislative history of the entire act, this Court noted "*Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole*," 473 U.S. at 142 n.9 (emphasis added), and that

> "[a] fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary."

473 U.S. at 142.

Notwithstanding *Russell*, the court of appeals in this case permitted plaintiffs to breeze by the plan-based limitations of liability and remedies set forth in § 409 to hold a fiduciary liable to a class of individuals for an alleged breach of the duties set forth in § 404. Under the holding of the court, all any plaintiff must do to maintain a civil action for breach of fiduciary duty—individually and not on behalf of a plan—is to assert a breach of the duties of loyalty in § 404 and run right to § 502(a)(3)'s "appropriate equitable relief" enforcement provision without ever pausing at or demonstrating compliance with § 409. If the decision of the court of appeals is upheld, Congress's considered judgment to limit "liability for breach of fiduciary duty" to specific—and plan-based—remedies under § 409 will be overcome.

Long established and frequently repeated precedent does not permit such a result. "[I]t is a commonplace of statutory

construction that the specific governs over the general . . . ." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). This Court has repeatedly applied that principle, in a variety of contexts, to determine that where a statutory framework indicates that Congress has addressed an issue directly and specifically in one part of a statute, broader general language—even generalized language apparently indicating the existence of "general 'remedies' ", *id.* at 385—will not govern the issue. *Id.* (refusing to read savings clause in Airline Deregulation Act, which preserved state law "remedies now existing at common law or by statute", to "supersede specific substantive pre-emption provision"); *accord, e.g.*, *HCSC-Laundry* v. *United States*, 450 U.S. 1, 6 (1981) (per curiam) (refusing to give effect to general exemptions in Internal Revenue Code subsections that on their face applied to petitioner because a third subsection "expressly concern[ed] the tax status" of petitioner's organization; the latter section was therefore "controlling and exclusive"); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (holding that specific patent infringement venue provision is "sole and exclusive provision controlling venue" in infringement actions despite general language in another portion of statute entitled "[v]enue generally"); *MacEvoy Co.* v. *United States ex rel. Calvin Tompkins Co.*, 322 U.S. 102, 107 (1944) (ruling that general statutory language allowing suits to recover bond deficiencies could not govern over specific limitation granting to subclass right to bring suit); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932).

This Court has construed ERISA with deliberate care so as to respect *all* its terms and provisions, particularly clauses or provisions intended to limit the scope or nature of the provision at issue. *See, e.g.*, *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 115 S. Ct. 1671, 1679 (1995) (construing ERISA preemption so as not "to read the limiting language in [that clause] out of the statute, a conclusion that would violate basic principles of

statutory interpretation"); *Massachusetts* v. *Morash*, 490 U.S. 107, 114, 115-16 (1989) (construing "vacation benefits" narrowly in definition of ERISA "welfare benefit plan" to include a multiemployer fund created to provide vacation benefits but to exclude broader regular vacation pay in light of other benefits covered in definition); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989) (construing "benefits under the plan" in ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6) (1988), to mean only "accrued" benefits, given the "elaborate provisions to determine an employee's right to benefits" found in Title I of ERISA; "[i]t is inconceivable that [§ 4044(a)] was designed to modify the carefully crafted provisions of Title I" by creating new entitlements); *Pilot Life*, *supra*, 481 U.S. at 51-57 (construing savings clause of ERISA preemption clause narrowly in light of ERISA civil enforcement scheme, intended by Congress to be exclusive).

Section 502(a)(3) is devoid of the kind of limiting language set forth in § 409. The former provides that

> "[a] civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988). This is the most general of provisions; there is no reference at all—as there is in § 502(a)(2)—to liability for breach of fiduciary duty, let alone to the particular remedies for which it allows recovery.

On the other hand, Congress made a cluster of choices in enacting ERISA's fiduciary provisions: It chose to include a particular provision, § 404, to set forth the duties owed by a fiduciary to participants and beneficiaries. It chose a different—and quite specific—provision, § 409, to establish lia-

bility and the remedies for failure to carry out those duties.[19] Finally, because it concluded that these remedies should be available in civil actions, it chose to include a specific provision, § 502(a)(2), to effectuate that enforcement. It could hardly have done so with the expectation that all those efforts would be swallowed up by the most general language from another provision that does not mention fiduciary duties at all.

In *Russell* itself, this Court rejected a similar effort to read out of ERISA critical portions of its text. There, the plaintiff sought to "read directly from the opening clause of § 409(a), which identifies the proscribed acts, to the 'catchall' remedy phrase at the end." 473 U.S. at 141. This was impermissible because it ignored the "intervening language establishing remedies benefiting, in the first instance, solely the plan." *Id.* at 141-42. Blithely skipping over the remedies in the intervening clauses, this Court held, "would divorce the phrase being construed from its context and construct an entirely new *class* of relief available to entities other than the plan." *Id.* at 142 (emphasis in original). Rather, read with the plan-specific remedies that form the core of the provision, the Court determined that "recovery for a violation of § 409 inures to the benefit of the plan as a whole." *Id.* at 140.

In expounding upon ERISA's legislative history to identify the plan-based nature of ERISA's remedies for fiduciary duty, this Court in *Russell* did not limit itself to congressional pronouncements as to § 409 itself. Rather, the Court cited a long list of examples from committee reports and floor debate to demonstrate generally that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future." *See Russell, supra* 473 U.S. at 141 n.8.

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[19] The language of the title of § 409 "Liability for breach of fiduciary duty" is of significance in determining its inherent purport. *Mead Corp., supra,* 490 U.S. at 723.

With these concerns in mind, Congress provided a specific "roadmap" in providing remedies for breach of fiduciary duty. As this Court noted in *Mertens, supra,* 113 S. Ct. at 2066:

> "Fiduciaries are assigned a number of detailed duties and responsibilities, which include 'the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.' . . . ; *see* 29 U.S.C. 1104(a). Section 409(a), 29 U.S.C. 1109(a), makes fiduciaries liable for breach of these duties, *and specifies the remedies available against them* . . . ."

Mertens, supra, 113 S. Ct. at 2066 (emphasis added; brackets in original);[20] *cf. Franklin* v. *Gwinnett County Public Schools,* 503 U.S. 60, 69-70 n.6 (1992) (noting that federal courts can sometimes fashion remedies but specifically distinguishing *Russell* which rejected claim involving "statute that expressly enumerated the remedies available to plaintiffs").

Section 502(a)(3) is hardly robbed of meaning under ERISA by reading § 502(a)(2) as the mechanism by which claims for breach of fiduciary duty must be asserted. The former section provides an equitable remedy for violations of numerous regulatory provisions set forth in Title I of ERISA, most of which do not themselves contain specific corresponding remedies. These include equitable relief to enforce compliance with certain of ERISA's reporting and disclosure requirements, ERISA §§ 101-111, 29 U.S.C. 1021-1031 (1988 & Supp. V 1993), as amended, its participation and vesting

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[20] *Accord Vespasian* v. *Sweeney,* No. 93-4343, 1995 WL 154982, at *6 n.3 (6th Cir. Apr. 6, 1995) (unpublished disposition); *McLeod* v. *Oregon Lithoprint Inc.,* 46 F.3d 956, 960 (9th Cir. 1995); *Adcox* v. *Teledyne, Inc.,* 21 F.3d 1381, 1390 (6th Cir.), *cert. denied,* 115 S. Ct. 193 (1994); *Simmons* v. *Southern Bell Telephone & Telegraph Co.,* 940 F.2d 614, 617 (11th Cir. 1991); *Horan* v. *Kaiser Steel Retirement Plan,* 947 F.2d 1412, 1418 (9th Cir. 1991); *Bryant* v. *International Fruit Product Co.,* 886 F.2d 132, 135 (6th Cir. 1989); *Sokol* v. *Bernstein,* 803 F.2d 532, 536 (9th Cir. 1986); *Richards* v. *General Motors Corp.,* 850 F.Supp. 1325, 1336-41 (E.D. Mich. 1994) (collecting cases).

provisions set forth in Part 2, ERISA §§ 201-211, 29 U.S.C. §§ 1051-1061 (1988 & Supp. V 1993), as amended, its funding requirements set forth in Part 3, ERISA §§ 301-306, 29 U.S.C. §§ 1081-1086 (1988 & Supp. V 1993), as amended, certain substantive rights set forth in Part 5, such as ERISA's claim for interference with protected rights, ERISA § 510, 29 U.S.C. § 1140 (1988), and certain of the provisions regarding continuation of health coverage, ERISA §§ 601-609, 29 U.S.C. 1161-1169 (1988 & Supp. V 1993), enacted after ERISA, but now part of Title I of the statute. There are thus numerous instances in which an individual participant or beneficiary may properly invoke § 502(a)(3). *See, e.g. Teumer* v. *General Motors Corp.*, 34 F.3d 542, 544 (7th Cir. 1994); *Uselton* v. *Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564, 582 (10th Cir.), *cert. denied*, 502 U.S. 983 (1991).

ERISA's legislative history confirms that the remedies ultimately placed in § 409 were meant to cover all actions for breach of fiduciary duty. The liability and remedy provision relating to breach of fiduciary duties that ultimately became § 409—including its plan-based language—was included in the very first ERISA bill introduced, H.R. 2, 93d Cong., 1st Sess. § 111 (1973) *reprinted in* Leg. Hist. 3, at 44, and variants of that liability provision—with the same plan-based relief—were included in every single bill introduced thereafter. *E.g.*, S.4 (as introduced), 93d Cong., 1st Sess. § 510 (1973), *reprinted in* Leg. Hist. 93, at 177; S. 1557, 93d Cong., 1st Sess. § 11 (1973), *reprinted in* Leg. Hist. 280, at 313; S. 4 (as reported), 93d Cong., 1st Sess. § 510 (1973), *reprinted in* Leg. Hist. 389, at 572-73.

The "other appropriate equitable relief" provision set forth in § 502(a)(3), on the other hand, first appeared only in the statute as reported out of the Joint Conference Committee, after passage by both Houses of Congress of different bills. H.R. Rep. No. 1280, 93d Cong., 2d Sess. 75 (1974), *reprinted in* Leg. Hist. 4277, at 4350. There is no indication in the Conference Committee Report that the provision was intended to supersede or infringe upon the quite specific remedies imposed under § 409. Precursors of 502(a)(3) did include provision for injunctive relief (not the broader "equitable" relief), *e.g.*, H.R. 9824, 93d Cong., 1st Sess. § 503 (1973), *reprinted in* Leg. Hist. 686, at 769, although such provisions only appeared after both Houses began to include increasingly detailed regulatory provisions, that did *not* have corresponding remedies included in the statute. *Compare e.g.*, H.R. 2, 93d Cong., 1st Sess. (1973), *reprinted in* Leg. Hist. 3-65 (bill containing detailed disclosure and fiduciary provisions but limited vesting and funding provisions; no residual provision) *with* H.R. 9824, 93d Cong., 1st Sess. (1973), *reprinted in* Leg. Hist. 686-777 (bill containing detailed disclosure, fiduciary, vesting, funding, and plan termination insurance provisions; first appearance of residual injunction provision).

In reading the "other appropriate equitable relief" provision of § 502(a)(3) to allow a private—non-plan-based—cause of action, the court below expressed concern that its failure to do so "would leave unredressed an egregious wrong" (PA 16a). The court accordingly adopted Justice Brennan's concurrence in *Russell*, an opinion which relied upon common law principles of trust law and the "promotion of the best interests of participants and beneficiaries," 473 U.S. at 158, to permit individual participants and beneficiaries to assert claims for breach of fiduciary duty on their own behalves. 473 U.S. at 155. The concurring opinion was rooted in Congress's intent to "incorporate the fiduciary standards of trust law into ERISA," *id.* at 152, through the development of federal common law, *id.* at 156, and the "fundamental concept of trust law . . . that courts 'will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests.' " *Id.* at 157.

There is, of course, no dispute that ERISA incorporates certain principles of trust law, *e.g. Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989). Nor is there any dispute

that this Court has indicated that courts may incorporate those general principles in developing a body of federal common law under the statute to fill gaps in left in the statute. *Id.* But, as this Court held in *Mertens*, the authority of courts "to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute." 113 S. Ct. at 2070. And whatever powers federal courts may have to shape federal common law with respect to statutory obligations does not mean "that Congress intended courts to have the power to alter or supplement the remedies enacted." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 645 (1981). This is especially true where the remedies afforded in the statute are detailed and specific; in that case, there is a "sharp distinction between the lawmaking powers conferred in defining violations [of the statute] and the ability to fashion the relief available to parties claiming injury." *Id.* at 644.

The remedies set forth in § 409 are as detailed as they are specific. Moreover, as the legislative history of ERISA indicates, the principles adopted from the law of trusts with respect to § 404 itself were not about remedies at all. Rather, that section "incorporate[d] core principles of fiduciary *conduct* as adopted from existing trust law." S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973), *reprinted in* Leg. Hist. 587, at 616. On the other hand, the trust law principles enshrined by Congress in ERISA with respect to remedies focused specifically on the remedies set forth in § 409, which abound with the very "plan-based" language that formed the basis of this Court's opinion in *Russell*. *E.g.*, S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973), *reprinted in* Leg. Hist. 587, at 619.

In crafting its remedy, the court below looked to generalized notions of trust law to read into § 502(a)(3) a remedy that was never intended by Congress under ERISA.[21] Reading

[21] As this Court stated in *Mertens*:

"[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. This is especially true with legislation

the words of § 502(a)(3) in isolation from the full context of Part 4 of ERISA, the court simply ignored the detailed, specific and plan-based remedy of § 409 and § 502(a)(2), rendering those limitations nugatory. The decision below allowing individuals to assert claims on their own behalf for breach of fiduciary duty under ERISA should be reversed.

II.

VARITY WAS NOT ACTING IN ITS FIDUCIARY CAPACITY IN FAILING TO DISCLOSE FACTS CONCERNING THE LIKELIHOOD THAT MCC WOULD BE A SUCCESS

Even if plaintiffs are entitled to maintain individual claims for breach of fiduciary duty under ERISA, the court of appeals' ruling in this case must be reversed because the claimed wrongs are not governed by ERISA fiduciary standards.

The court below awarded retiree plaintiffs welfare benefits, ruling that Varity had breached fiduciary duties under ERISA by misleading plaintiffs as to the future business prospects of MCC and thus as to the risk that they would lose their benefits if they accepted employment at MCC. To support this determination, the court relied upon findings of the district court relating to: (i) misleading statements by Varity to employees that MCC "had a bright future" (PA 3a); (ii) Varity's decision not to provide additional details to employees concerning the risks involved in transferring to MCC (PA 4a); and (iii) Varity's supposed failure to repeat the reserved right to amend or terminate benefits—a right fully disclosed in 1984—upon the creation of MCC. (PA 5a) From these facts, the court concluded that Varity had breached its fiduciary

such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs."

113 S. Ct. at 2071 (citation omitted; emphasis in original).

duties to plaintiffs by making "[m]isleading communications to plan participants regarding plan administration." (PA 13a; citation omitted)

It is noteworthy, at the outset, what the court of appeals did not—and could not—conclude. There was no finding that Varity as plan administrator had misrepresented or not disclosed plan terms as required by the ERISA disclosure provisions, while plaintiffs were at MF or at MCC. There was no reference by the court to the undisputed fact found by the district court that Varity had sent to all plaintiffs the 1984 CMMP Memo, reserving (in capital letters) the right "TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART." There was no finding that Varity had ever orally or informally promised plaintiffs that they would receive benefits forever, or that they could not be terminated at any time. Indeed, based on the reservation of rights in the master plan document, the court below ruled that under the plan terms themselves, plaintiffs were barred from recovering under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1988), *any* benefits at all, let alone lifetime benefits. (PA 9a (the plan language "unambiguously confers on the company the right to amend or terminate the Plan")) Therefore, a finding that Varity failed to administer the plan in accordance with its terms was as impossible as the conclusion that Varity was acting in the context of "plan administration."

ERISA's statutory scheme plainly contemplates that a person subject to ERISA-imposed fiduciary obligations is not subject to those obligations at all times. The definition of "fiduciary" in ERISA provides:

> "[A] person is a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) *he has any discretionary authority or discretionary responsibility in the administration of such plan.*"

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988) (emphasis added). *See Mertens, supra*, 113 S. Ct. at 2071 (§ 1002(21)(A) is a "functional" definition). Courts have consistently recognized that employers act both in fiduciary and non-fiduciary capacities because employers who perform fiduciary functions also make business decisions that are not governed by ERISA at all. *See Amato* v. *Western Union International, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985) (employers "assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA"), *cert. dismissed*, 474 U.S. 1113 (1986); *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990) (an "employer's decision to amend or terminate an employee benefit plan is unconstrained by the fiduciary duties that ERISA imposes on plan administration"). As this Court recently observed, " '[a] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.' " *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1228 (1995) (quoting *Adams* v. *Avondale Industries, Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990)).

The issue raised by this case involves the third part of the ERISA definition of "fiduciary"—whether Varity was exercising "discretionary authority or discretionary responsibility *in the administration of a plan*"[22] when, having fully disclosed to plaintiffs its right to amend, modify or terminate

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[22] There is no allegation in this case that Varity breached any duty in the exercise of authority or discretionary control over plan assets. Nor is there any allegation that Varity's breach here involved the rendering of investment advice.

welfare benefits, it allegedly did not fully inform plaintiffs as to the likely future financial viability of MCC. Put another way, when Varity urged its employees to transfer to MCC, was it exercising its power to "administer" a plan? If not, under the plain language of the statute, Varity was not acting as a fiduciary.

The mere fact that employers make business decisions that have an adverse impact upon the provision of benefits does not render those decisions ones of plan administration. "Design" or "settlor" functions—decisions as to whether and to what extent to provide benefits—have consistently been distinguished from "administration" functions—running the plan according to its terms. *See Hozier, supra*, 908 F.2d at 1159 n.3; *Musto* v. *American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988) ("There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be."), *cert. denied*, 490 U.S. 1020 (1989).

Moreover, employers, as this Court recently observed, always retain the general power to terminate ERISA welfare benefits. *Curtiss-Wright, supra*, 115 S. Ct. at 1228 ("[E]mployers and other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."). There is a firm statutory basis for this rule, one noted by this Court in *Curtiss-Wright*. ERISA imposes a variety of complex participation, vesting and accrual requirements *only* upon *pension* plans, not welfare plans. *Id.*; *accord Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). Thus, under ERISA, pension plans must meet detailed minimum requirements concerning how benefits are to accrue over time. ERISA § 204, 29 U.S.C. § 1054 (1988 & Supp. V 1993), as amended. ERISA further imposes strict rules as to how benefits become vested. ERISA § 203, 29 U.S.C. § 1053 (1988 & Supp. V 1993), as amended. ERISA limits, as well, the ways in which specific vesting schedules can be changed. ERISA § 203(c), 29 U.S.C. § 1053(c) (1988 & Supp. V 1993).

Congress's decision to impose "limitations so meticulously built into the participation and vesting requirements," *excluding* welfare benefits, *Hozier, supra*, 908 F.2d at 1161, was the result of a careful balancing of competing interests. In enacting ERISA, Congress was centrally concerned with "promot[ing] the interests of employees and their beneficiaries in employee benefit plans." *Shaw, supra*, 463 U.S. at 90. At the same time, Congress recognized that ERISA would impose additional costs on employers, *see* H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1973), *reprinted in* Leg. Hist. at 2348, and analyzed "all of the provisions . . . on the basis of their projected costs in relation to the anticipated benefit to the employee participant." *Id.*; *see Mertens, supra*, 113 S. Ct. at 2072 (noting " 'tension' " in ERISA between " 'primary goal of benefitting employees and the subsidiary goal of containing pension costs' " and declining to "adjust the balance" by imposing broader fiduciary liability than the statute provides); *see also Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990) (observing that goal of ERISA preemption clause was to minimize administrative and financial burdens on employers that could work to the detriment of beneficiaries); *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987) (noting Congress's recognition that employers might offset inefficiencies by reducing benefits or refraining from offering benefits).

The added costs associated with welfare benefits led Congress carefully—and crucially—to separate them from pension benefits, and to decline to impose upon employers the obligation to offer the former or (as in the case of pension benefits) to require their vesting, funding or accrual. As the Conference Report of the House of Representatives stated:

> "The term 'accrued benefit' refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance . . . . To require the vesting of these ancillary benefits would seriously complicate the administration

and increase the cost of plans whose primary function is to provide retirement income."

H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974), *reprinted in* Leg. Hist. 3115, at 3180.

Accordingly, it is now well-established that the obligation of employers to provide or continue to provide welfare benefits depends solely upon the terms of the applicable benefits plan documents, and any given beneficiary's entitlement to particular benefits is governed by ordinary principles of contract interpretation. *E.g.*, *Bellino* v. *Schlumberger Technologies, Inc.*, 944 F.2d 26, 29 (1st Cir. 1991); *Moore* v. *Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Hamilton* v. *Air Jamaica, Ltd.*, 945 F.2d 74, 77 (3d Cir. 1991), *cert. denied*, 503 U.S. 938 (1992); *Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1442 (1995); *United Paperworkers International Union* v. *Champion International Corp.*, 908 F.2d 1252, 1256-57 (5th Cir. 1990); *Astor* v. *International Business Machines Corp.*, 7 F.3d 533, 540 (6th Cir. 1993); *Ryan* v. *Chromalloy American Corp.*, 877 F.2d 598, 603 (7th Cir. 1989); *Howe* v. *Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990); *Alday* v. *Container Corp.*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

An employer need not offer welfare benefits. If it chooses to do so, its obligations to continue to provide them depend solely upon the terms of the plan. In other words, employers are only obligated to provide what they have promised to provide in the written plan documents. *See Curtiss-Wright*, *supra*, 115 S. Ct. at 1228.

ERISA thus quite deliberately affords employers latitude to adjust the provision of welfare benefits as fluctuating costs and business realities dictate. These rules are not only an inescapable necessity given the costs—and the unpredictable nature of the costs over time—of health care benefits; they are an ineluctable part of the balance between promoting the interests of beneficiaries while containing employer costs, a

balance that runs through the entire statute, and the one struck by Congress when it chose to exclude welfare plans from the stringent obligations imposed upon pension plans.

ERISA's fiduciary provision, ERISA § 404, 29 U.S.C. § 1104 (1988 & Supp. V 1993), may not be employed to upset this carefully-crafted balance. The language of § 404 obliges a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" and "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. V 1993). But the language does not address *when* an employer is acting in a fiduciary capacity. Were this provision held to govern whenever an employer acted to terminate or reduce benefits, the employer could *never* do so, whatever language was included in the plan documents: by definition, any such action could be viewed as contrary to the interests of participants and beneficiaries. *Hozier*, *supra*, 908 F.2d at 1159 ("[I]f an employer's decision whether or not to amend a benefit plan constituted a decision about plan 'administration' . . . , it is virtually impossible to see how [the decision] . . . could pass muster . . . ."). As a result, when the employer makes decisions other than those involved in plan administration itself—even when those decisions unquestionably adversely affect the interests of beneficiaries—the employer acts as plan "settlor" and not in a fiduciary capacity.

Under precisely this same analysis, § 404(a) may not be invoked—as it has been in this case—as a basis for the award of benefits when an employer is accused of failing to warn or misleading its employees about the likelihood that benefits will be changed or reduced in the future—so long as the employer has fully disclosed its right to do so. *See, e.g.*, *Young* v. *Standard Oil (Indiana)*, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988); *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1323 & n.28 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1699 (1995); *Lea* v. *Republic Airlines, Inc.*,

903 F.2d 624, 631 (9th Cir. 1990); *Blaw Knox Retirement Income Plan* v. *White Consolidated Industries, Inc.*, 998 F.2d 1185, 1190 (3d Cir. 1993).

ERISA's statutory framework addresses and protects an employee's reasonable expectations as to the benefits he or she is entitled to receive under a benefit plan, and it does so in comprehensive detail. But this scheme is "built around reliance on the face of written plan documents." *Curtiss-Wright, supra*, 115 S. Ct. at 1230. Thus, ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (1988). The statute also requires that a fiduciary shall "discharge his duties . . . in accordance with the documents and instruments governing the plan ." ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (Supp. V 1993).

Moreover, ERISA sets forth comprehensive and specific rules concerning the kinds of information that plan administrators are required to disclose to employees. ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031 (1988 & Supp. V 1993), as amended.[23] Thus, ERISA requires administrators to furnish to participants a summary plan description, ERISA § 101(a), 29 U.S.C. § 1021(a) (1988 & Supp. V 1993), which "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1) (1988). Any summary of "material modification" to a plan must also be disclosed, ERISA § 102(a), 29 U.S.C. § 1022(a) (1988), and must also be "written in a manner calculated to be understood by the average plan participant." ERISA § 102(a)(1), 29 U.S.C.

[23] As early as 1979, this Court recognized that "ERISA requires pension plans to disclose specified information to employees in a specified manner, see 29 U.S.C. §§ 1021-1030, in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts." *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 569 (1979) (citations omitted).

§ 1022(a)(1) (1988). Moreover, plan administrators must disclose certain financial information in annual reports filed with the Secretary of Labor and available to participants upon request. ERISA §§ 103(b)(1), (3), 104(b), 29 U.S.C. §§ 1023(b)(1), (3), 1024(b) (1988 & Supp. V 1993).[24] In none of these (or any other) ERISA reporting and disclosure provisions did Congress require that an employer disclose when it will (or whether it expects to) terminate a plan.

Likewise, ERISA tells plan administrators when to disclose information. Financial reports must be published annually; summary plan descriptions must be furnished within 90 days after an employee first receives benefits (or within 120 days after a plan becomes subject to ERISA); a summary plan description integrating all plan amendments made over the course of a five-year period must be disseminated every five years after a plan becomes subject to ERISA. ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1) (1988 & Supp. V 1993). Finally,

> "[i]f there is a modification or change [to the plan] a summary description of such modification or change shall be furnished *not later than 210 days after* the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan."

ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1) (1988 & Supp. V 1993) (emphasis added).

[24] Employers who provide welfare benefits must thus include in their annual reports statements of assets and liabilities; changes in fund balance and financial position; notes to financial statements describing, *inter alia*, "any significant changes in the plan made" during the prior year "and the impact of such changes on benefits"; information concerning loans, transactions, income obligations in default as of the close of the plan's fiscal year and so forth. *See* ERISA §§ 103(b)(1), (3), 29 U.S.C. § 1023(b)(1), (3) (1988).

There is no ERISA-imposed obligation to provide participants with a day-to-day (or even near future) picture of whether an employer intends in the future to terminate benefits. In fact, the statute explicitly contemplates that participants need only be told of changes or reductions in benefits months after they have occurred.[25]

Like the vesting, accrual and funding provisions, Congress enacted the reporting and disclosure requirements fully aware that they imposed additional burdens upon employers. *See* 120 Cong. Rec. 4278 (1974) ("Each regulation has to be weighed against the burdens and pressures it imposes on the system. Each requirement has to be weighed against the cost increase which might result.") (statement of Rep. Perkins), *reprinted in* Leg. Hist. at 3369.[26] Given Congress's keen sensitivity to increased costs, it is telling that nowhere in the statute are employers obligated to describe in advance anticipated plan changes. The statute expressly allows an employer the latitude to change first and disclose later.

This Court's recent decision in *Curtiss-Wright, supra*, strongly supports this analysis. There, this Court reversed the determination of the Third Circuit, which had affirmed an award of benefits on the theory that a reservation of the right to amend or terminate had not constituted a valid amendment procedure under ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3) (1988). In so ruling this Court determined that not only had the reservation of rights satisfied the "plain text" of § 402(b)(3), 115 S. Ct. at 1229, it also rejected plaintiffs'

[25] *See also* 29 C.F.R. § 2520.104b-3 (1994) ("A plan which adopts an amendment which makes a material modification to the plan which takes effect on a date in the future must disclose a summary of that modification within 210 days after the close of the plan year in which the modification or change is adopted.").

[26] *Accord* 120 Cong. Rec. 29, 944-45 (1974), *reprinted in* Leg. Hist. at 4778 (statement of Sen. Long); 120 Cong. Rec. 4295 (1974), *reprinted in* Leg. Hist. at 3411 (statement of Rep. Ullman); 120 Cong. Rec. 4314 (1974), *reprinted in* Leg. Hist. at 3466-67 (statement of Rep. Rostenkowski).

argument that ERISA "guarantee[s] that the [amendment] procedure conveys enough detail to enable beneficiaries to learn their rights and obligations under the plan at any time." 115 S. Ct. at 1230. This Court stated:

> "Respondents are no doubt right that one of ERISA's central goals is to enable plan beneficiaries to learn their rights and obligations at any time. But ERISA already *has* an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of written plan documents."

115 S. Ct. at 1230 (emphasis in original).

In explaining this scheme, this Court looked specifically to the "comprehensive scheme of 'reporting and disclosure' requirements," 115 S. Ct. at 1230 (including the requirement that summaries of amendments need not be provided until after the amendment has been made, *id.*), and it noted that the purpose of these requirements was "to communicate to beneficiaries the essential information about the plan." *Id.* This Court concluded:

> "This may not be a foolproof informational scheme, although it is quite thorough. Either way, it is the scheme that Congress devised. And we do not think Congress intended it to be supplemented by a far-away provision in another part of the statute, least of all in a way that would lead to improbable results."

115 S. Ct. at 1231 (citation omitted).[27]

[27] *Curtiss-Wright*, like this case, reflects an attempt by plaintiffs to recover retiree welfare benefits where the plan documents established no entitlement to those benefits. In *Curtiss-Wright*, plaintiffs lost their health benefits when Curtiss-Wright shut down the division from which plaintiffs had retired. 115 S. Ct. at 1227. When review of the SPD in that case foreclosed a contractual claim for lifetime benefits, plaintiffs and the lower courts turned to the issue of the validity of the company's plan amendment procedure. *Id.* In the course of rejecting that attempt to

In this case, plaintiffs received all the information concerning their benefits to which Congress had determined they were entitled under ERISA. Plaintiffs were told before they transferred to MCC that under the benefits plan the plan administrator had the right to amend, modify or terminate their health benefits at any time. They were given this information in the context of a reduction in benefits applicable to employees and retirees. The court of appeals did not even mention this fact, or suggest that plaintiffs had not been so advised. It did not impose liability based upon any misrepresentation of plan terms or any violation of ERISA's reporting and disclosure provisions. The court held, in fact, that on the face of the written plan documents, plaintiffs were *not* entitled to recover benefits. (PA 9a) *See Curtiss-Wright*, *supra*, 115 S. Ct. at 1230.

The court of appeals found that Varity misled employees as to MCC's chances of success. But this does not provide any cognizable statutory basis for imposing liability. The court recited facts that it considered an "egregious wrong" (PA 16a); it determined that these facts went "beyond mere business decisions" (PA 13a); but it could not begin to explain how Varity's behavior had entered the realm of "plan administration."[28] Whether Varity violated the "duties of loyalty and

recover benefits where they were not promised, the Court also indicated that the breach of fiduciary duty approach would be similarly unavailing in the pursuit of welfare benefits. *Id.* at 1228.

[28] The line of cases relied upon by the court below (PA 12a-13a) are similarly flawed. Those cases pay lip service to the notion that an employer can make business decisions that adversely affect benefits without being limited by ERISA's fiduciary obligations. *E.g.*, *Berlin*, *supra*, 858 F.2d at 1163. But they go on to hold—without any analysis of the comprehensive disclosure scheme discussed in text above—that if an employer has given "serious consideration" to a change in benefits and not disclosed it, the employer is to be held liable. Indeed, some of these cases have inaptly likened the duty of disclosure to that imposed by the federal securities laws. *See, e.g.*, *Fischer* v. *Philadelphia Electric Co.*, 994 F. 2d 130, 135 (3d Cir.) (citing *Basic Inc.* v. *Levinson*, 485 U.S. 224, 232-41 (1988) and *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976)), *cert. denied*, 114 S. Ct. 622 (1993). That analogy has been rejected by this Court. *See International Brotherhood of Teamsters*, *supra*, 439 U.S. at 569 (discussed at note 23 *supra*).

prudence described in 29 U.S.C. 1104" (PA 13a) is hardly the issue if Varity did not owe those duties when it contemplated its own future conduct and its obligations to its employees.

The very nature of ERISA dictates reversal here. In determining that the acts of Varity held actionable were undertaken in its fiduciary capacity, the court below circumvented ERISA's definition of "fiduciary" by simply invoking the talismanic phrase "duties of loyalty and prudence" (13a) to find that Varity was required to disclose its expectation that plaintiffs would ultimately lose benefits.[29] In so doing, the court not only begged the central question of whether Varity *owed* fiduciary duties at the time of its challenged conduct but ignored the actual statutory obligations imposed upon Varity by the statute. The court did this without addressing how such a duty of disclosure could possibly exist where Varity was concededly permitted to terminate the plan altogether; and without finding any violation of, or even mentioning, the detailed disclosure requirements set forth in the statute. In ruling that Varity acted as a fiduciary, the court frustrated the balance struck by Congress between the obligations of employers to comply with ERISA's disclosure provisions and the desirability of creating incentives for employers to offer welfare benefit plans in the first place.

[29] *Compare Young*, *supra*, 849 F.2d at 1045 ("[t]hough perhaps desirable in normal business conduct, Amoco owed no legal duty to reveal that it intended to create a special severance plan for the divestiture of" failing division); *Borst*, *supra*, 36 F.3d at 1323 n. 28 (employer's "statements [misrepresenting intent not to set aside plan reserves] were not shown to be made in its fiduciary capacity, as opposed to being statements of intended action in its corporate nonfiduciary capacity"); *Lea*, *supra*, 903 F.2d at 631; *Blaw Knox*, *supra*, 998 F.2d at 1190.

CONCLUSION

The ruling of the court of appeals should be reversed to the extent it affirmed liability against Varity.

Dated: New York, New York
June 23, 1995

Respectfully submitted,

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(11)

No. 94-1471

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In The

Supreme Court of the United States

October Term, 1995

VARITY CORPORATION,

Petitioner,

v.

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act ("ERISA") § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), permit individual ERISA plan participants and beneficiaries to recover on their own behalf for breaches of fiduciary duty under ERISA?

2. Does ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1988 & Supp. 1993), impose a duty upon plan fiduciaries not to make affirmative misrepresentations to plan participants and beneficiaries?

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This case is about ERISA fiduciaries who carried out a fraudulent scheme to rid themselves of welfare benefit obligations to employees and retirees by transferring those obligations to a sham corporation which was essentially bankrupt from the outset. (See Appendix to Petition for a Writ of Certiorari, hereinafter referred to as "PA", 55a ¶ 24.) In so doing, the fiduciaries breached their most

fundamental duty to their plan participants – the duty of honesty. This case, in short, is about whether ERISA fiduciaries can lie to plan participants and get away with it.

Respondents are former employees of petitioner[1] who participated in the Massey Ferguson, Inc. employee benefit plan (the "MF plan"). The MF plan is an "employee welfare benefit plan" within the meaning of § 3(1) of ERISA, 29 U.S.C. § 1002(1) (1988). It includes benefits for life insurance, medical, vision, hearing, and dental care. (PA 51a, ¶ 2.) Respondents include a class of 83 plaintiffs who were active employees of petitioner and who were fraudulently induced to consent to the transfer – and resulting loss – of their employment and benefit rights to the sham corporation, Massey Combines Corporation ("MCC"). Those respondents were identified in this litigation as the "Retired Class" because they retired from MCC before its demise. Respondents also include 10 individual plaintiffs who already had retired from employment with petitioner at the time of the creation of MCC. Petitioner unilaterally purported to transfer to MCC its obligation to pay welfare benefits to the 10 individual respondents.[2]

[1] Massey Ferguson, Inc. and its parent corporation, Varity Corp., were separately named as defendants in this action. Because Massey Ferguson, Inc. has subsequently merged into Varity Corp., the defendants will collectively be referred to herein as "petitioner," except where necessary to provide context to the factual findings. In such instances, Varity Corp. will be referred to as "Varity" and Massey Ferguson, Inc. will be referred to as "MF."

[2] This litigation also originally included claims by another class of plaintiffs identified as the "Terminated Class," who

Petitioner's statement of the case focuses largely on matters other than the central issue of its fraudulent conduct, and at times also implies that at this stage of the proceedings there is some dispute about the finding that a fraud was committed. However, in the court of appeals petitioner did not challenge any of the district court's findings of fact, which the court of appeals appropriately characterized as "comprehensive and painstaking." (PA 7a.) The facts as found by the district court (PA 50a-80a) are, therefore, not in dispute. The findings of fact powerfully document petitioner's fraudulent scheme, and need only be briefly highlighted here.

The fraudulent scheme, cynically dubbed "Project Sunshine," was developed by petitioner in 1985. It was designed to improve petitioner's financial health by spinning off to the newly-formed MCC most of petitioner's Combines and Related Equipment ("CARE") division, as well as other unprofitable assets which were not part of the CARE division, and by transferring to MCC a huge amount of corporate debt. One of the primary objectives of Project Sunshine was to rid petitioner of the obligation to pay benefits to employees and retirees. (PA 54a, ¶ 17; 65a, ¶ 69.)

transferred from petitioner to MCC and were still employed by MCC at the time of its demise. The claims of the Terminated Class are not at issue in this certiorari proceeding. The claims of a group of disabled plaintiffs were settled before trial and also are not at issue here.

MCC assumed $282.4 million (Canadian) of long-term debt from petitioner. It did so for inadequate consideration. (PA 57a, ¶ 29.) Those segments of the CARE division which were not profitable were transferred to MCC; the lucrative ones were not. For example, petitioner retained the very profitable parts business. (PA 58a, ¶ 33.) Similarly, petitioner retained real estate valued in the millions of dollars which had been part of the CARE division. (PA 58a, ¶ 34.) The only products to be manufactured by MCC which could be sold for a profit were balers, but a part of Project Sunshine required MCC to sell the balers exclusively to petitioner which, in turn, sold them for a profit. (PA 52a-53a, ¶ 11.) On the other hand, petitioner's retail stores, which historically had not been a part of the CARE division, but which were losing approximately $6 million per year, were transferred to MCC. (PA 57a, ¶ 31.)

When it was formed on May 9, 1986, MCC had on its books $54 million in losses (although it had never been in operation) and only $15,000 in cash. Inventory, receivables and other assets transferred to MCC were overvalued while liabilities and costs were understated. The company had a negative net worth on the day it was formed, with liabilities exceeding assets by at least $46 million. (PA 55a-56a, ¶ 24.)

The essence of MCC's business plan was the liquidation of assets. (PA 56a, ¶ 25.) The executive designated to preside over MCC's inevitable demise was Ivan Porter, who had been employed by petitioner for many years, including as President of the CARE division. Porter was assigned to MCC as its President and CEO with the understanding that he would return to petitioner after

two years. Unbeknownst to any other MCC employee, Porter actually remained an employee of petitioner while working with MCC. (PA 54a, ¶ 20.) During the first months of MCC's existence, Porter and other MCC executives openly discussed among themselves the fact that MCC could not survive; the expression they used was "that dog won't hunt." (PA 56a, ¶ 26.)

It was essential to the "success" of Project Sunshine that the existing employees of the CARE division and of the retail stores (including the members of the Retired Class) be persuaded to accept the transfer of their employment and benefit rights to MCC. The transfer served two purposes: first, it helped achieve petitioner's objective of divesting itself of employee benefit obligations; second, it was necessary for MCC to have employees in order to make it appear to be a viable entity into which petitioner could unload its corporate debt.

The existing employees' consent to the transfer was solicited through a letter from Ivan Porter (see Joint Appendix, hereinafter referred to as "JA", 81-83) which was sent to non-retail store employees and through an identical letter under another executive's signature sent to retail store employees. (PA 62a, ¶¶ 58-59.) These letters were accompanied by an acceptance form (JA 83), a transcript of a videotaped message from Porter (JA 78-80), a side-by-side comparison of MF and MCC employee benefit plans (JA 67-73), and a question and answer sheet (JA 74-77). (PA 62a, ¶ 60.) The acceptance form encouraged employees to sign and return it promptly "to ensure uninterrupted continuation of your pay and benefits." (JA 83.)

Petitioner also arranged meetings at various sites to solicit employees' acceptance of the transfer to MCC. The only meeting site for the employees who are members of the Retired Class was MF's corporate headquarters in Des Moines, Iowa. All available employees met in a large meeting room where the Porter videotape was shown, followed by distribution of the letter soliciting the employees' consent to the transfer. Petitioner directed that the tone of the meeting be "as light, upbeat and positive as possible." Petitioner wanted to "encourage, all salaried employees to sign the acceptance . . . and to leave [the acceptance form at the meeting]." (PA 62a-63a, ¶ 61.)

The information given to the employees portrayed a positive economic outlook for MCC. For example, the Porter letter stated:

> When you accept employment with Massey Combines Corporation . . . benefit programs will remain unchanged.
>
> * * *
>
> We are all very optimistic that our new company has a bright future . . .

(JA 82.) The Porter videotape transcript stated:

> When you transfer your employment to Massey Combines Corporation, . . . benefit programs will remain unchanged.
>
> * * *
>
> . . . we are doing many other exciting things designed to improve the profitability . . . of the business.

> * * *
>
> This financial restructuring created Massey Combines Corporation and will provide the funds necessary to ensure its future viability.
>
> * * *
>
> Finally, despite the depression which persists in the North American economy, I am excited about the future of Massey Combines Corporation. Together we can exploit all available opportunities in the combines business. I look forward to working with you in the future to ensure the success of Massey Combines Corporation.

(JA 80; PA 63a-64a, ¶ 63.)

The question and answer sheet distributed with the Porter letter contained eight questions and answers. Petitioner developed these questions and answers in anticipation of the "many concerns" of the employees, but petitioner purposely made the questions and answers incomplete, confusing, evasive and deceptive. (PA 64a, ¶ 64.) Petitioner did not include in the question and answer sheets certain questions it knew the employees wanted answered. For example, the employees wanted to know whether they were eligible for a termination pay benefit from MF. The employees also wanted to know if they could take early retirement from MF rather than transfer to MCC. Petitioner purposely did not provide answers to these and other questions because it wanted the employees to transfer to MCC in order to avoid the liabilities associated with severance pay and retirement benefits. The district court found that petitioner's failure to make those disclosures, in conjunction with its other

affirmative misrepresentations, was to the detriment of the Retired Class. (PA 64a-65a, ¶ 66.)

Only limited information was provided with the Porter letter concerning employee benefits. That information included a side-by-side comparison showing that MF's and MCC's benefits were identical. The question and answer sheet stated that "benefit programs will remain unchanged." (JA 75.) Petitioner considered telling the employees that "initially" benefits would remain the same but that MCC would be reviewing the benefits and would notify the employees of any changes. Petitioner rejected this disclosure because it believed it would cause the employees to reject the acceptance forms. Soon after the employees transferred to MCC, petitioner began to develop "creative and innovative ways" to reduce employee benefits. (PA 64a, ¶ 65.)

The district court also found that petitioner knew that it should tell the employees that it claimed the right to amend or terminate benefits even after retirement. Petitioner's internal communications showed that the Canadian government and petitioner's lenders insisted that "in communicating with employees in the formation of MCC, that we are very explicit about maintaining our rights to modify benefits in the future, i.e., that there is no promise that the present benefits will be guaranteed forever. As a result, we are faced with the awkward situation that the letter may not attract those employees who we would like to join MCC." Petitioner ultimately decided to ignore the advice of the Canadian government and its lenders and did not make the suggested disclosure to its employees. (PA 65a, ¶ 67.)

The district court found that "communications to employees of MF were laced with fraudulent misrepresentations in order to get them to sign acceptances of employment." (PA 89a.) The court found that petitioner's representations "regarding the potential financial viability of MCC, MCC's business outlook, and the employee benefits were materially misleading." It found that petitioner "knew the representations were materially misleading when made" and that "plaintiffs relied on these representations to their detriment." (PA 65a, ¶ 68.)

The members of the Retired Class, along with other CARE division and retail store employees, did sign the forms accepting the transfer of their employment and benefit rights to MCC.

In addition to the transfer of existing employees and their benefit rights, another essential feature of Project Sunshine was the transfer to MCC of petitioner's obligation to provide welfare benefits to approximately 4,000 of petitioner's former employees who were already retired at the time of MCC's formation (PA 57a, ¶ 30.); these included the 10 individual respondents in this action.[3]

None of the individual respondents authorized the transfer of the obligation to pay their welfare benefits from petitioner to MCC. Petitioner did not even attempt to persuade the individual respondents to consent to the transfer; rather, petitioner unilaterally assigned to MCC

[3] Almost all of the 4,000 retirees were former Canadian employees whose claims against petitioner after MCC's demise were settled in a separate action under Canadian law.

the obligation to pay benefits to the individual respondents (along with other MF retirees). The individual respondents were not even aware that this had occurred until the receivership of MCC, whereupon they learned of the transfer only because they stopped receiving benefits. (PA 51a-52a, ¶ 7; PA 65a, ¶ 70.)

Based on the unchallenged testimony of another industry executive, the district court found that Varity's Chairman and CEO, Victor Rice, bragged to his peers that he had "unloaded his losers all in one wagon" through Project Sunshine. The executive testified that Rice said he was "putting his big product losers, combines and four-wheel drives in [MCC]. He told us he was putting his big losers, company stores in [MCC] and told us he was shifting several thousand retirees and their pension obligations into [MCC] and was delighted to be out from under all those obligations." The executive also quoted Rice as stating that "he got the lenders to agree to shove about $200 million worth of debt over into [MCC] off of [Varity]." (PA 56a-57a, ¶ 28.)

As anticipated, MCC's business failed. It lost $88 million in its first year, and its losses continued to mount until it went into receivership (bankruptcy) in Canada on March 4, 1988. Like the MF plan (which MCC had simply adopted as its own), the MCC plan was self-funded (PA 51a, ¶ 3); as a result of the receivership, respondents stopped receiving their welfare benefits.

The district court found that petitioner's fraudulent conduct in connection with the transfer of respondents' benefit rights was "willful, wanton, malicious and in bad faith viś-a-viś all plaintiffs." (PA 78a, ¶ 110.)

The district court found that both MF and Varity were fiduciaries to the MF plan. MF's board of directors was the "named fiduciary" of the plan within the meaning of § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A) (1988), and MF itself was the plan administrator. (PA 78a, ¶ 111.) The district court found that Varity was a fiduciary with respect to the MF plan because Varity at all times controlled MF. (PA 79a, ¶ 112.) The court also found that Varity and MF were both fiduciaries to the MCC plan to the extent it had any existence apart from the MF plan. (PA 79a, ¶ 113.)

Based on evidence detailed in the findings and conclusions (see PA 80a-89a), the district court also concluded that petitioner was the alter ego of MCC – that MCC was never an independent legal entity separate and apart from petitioner, which designed, created and controlled every aspect of MCC throughout its existence. (PA 62a, ¶ 57.) The court found, in short, that "MCC was a sham from the start." (PA 89a.)

The district court found, and the court of appeals affirmed, that petitioner breached its ERISA fiduciary duties to the Retired Class through fraudulent misrepresentations made to induce them to accept the transfer of their benefit rights to MCC.[4] In addition, petitioner breached its fiduciary duty to the individual respondents by purporting unilaterally to transfer their benefit rights

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[4] While the district court found and the court of appeals affirmed that petitioner was guilty of fraudulent misrepresentations, both courts concluded that respondents' separate cause of action for fraud, as such, was preempted by ERISA. (PA 11a.)

from the MF plan to the MCC plan without their knowledge or consent, and without any authority to do so in the plan documents. The remedy for these breaches, as modified by the court of appeals, was an injunction requiring petitioner to reinstate respondents to the MF plan, together with an award of restitution for benefits which should have been paid from the time of the fraudulent transfer through the date of reinstatement.[5]

In upholding respondents' recovery for breach of fiduciary duty, the court of appeals gave effect to the plain language of § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (1988), authorizing actions by participants or beneficiaries to redress violations of Subchapter I of ERISA, which includes the provision defining the duties

[5] The form of equitable relief granted for petitioner's breach of fiduciary duty is not among the questions presented in this certiorari proceeding. The Chamber of Commerce as *amicus* attempts to raise the issue of whether the award of restitution for past benefits constitutes "appropriate equitable relief" under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (1988). In accordance with Supreme Court Rule 24.1(a), that issue is not properly before the Court and is therefore not addressed in respondents' argument. However, as the court of appeals noted, this Court in *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), twice listed restitution as a type of equitable relief available under § 502(a)(3). (PA 19a; *see* 113 S. Ct. at 2068, 2072.) The Court has also stated that a monetary award can properly be characterized as "equitable" relief when (as in this case) it is "incidental to or intertwined with injunctive relief." *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 571 (1990) (quoting *Tull v. United States*, 481 U.S. 412, 424 (1987)). *See also, In Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, No. 94-1875, 1995 WL 380983, at *9 (3d Cir. June 28, 1995) (relief including "restitutionary reimbursement for back benefits" was equitable in nature and therefore appropriate under § 502(a)(3)).

of an ERISA fiduciary. Contrary to petitioner's assertion, the court of appeals was not "silent" as to why petitioner's conduct in connection with Project Sunshine represented more than a mere business decision and was actionable as a breach of fiduciary duty. The court of appeals explained that, in the case of the Retired Class, petitioner's conduct was actionable because it involved intentionally misleading communications to plan participants regarding plan administration. (PA 12a-13a.) The court of appeals held that "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in § 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)." (PA 12a, quoting *Peoria Union Stock Yards Co. v. Penn Mutual Life Insurance Co.*, 698 F.2d 320, 326 (7th Cir. 1983).)

With respect to the individual respondents, the court of appeals explained that petitioner's conduct in purporting unilaterally to transfer their benefit rights to MCC without their knowledge or consent represented a "complete disregard of the rights and interests of beneficiaries" and a "clear breach of fiduciary duty in violation of § [404(a)(1)]." (PA 17a.) Notably, petitioner does not appear to dispute the court of appeals' conclusion that its conduct as to the individual respondents constituted a breach of fiduciary duty.

Much of petitioner's statement of the case is devoted to a discussion of the record and procedural history relating to a claim which is not at issue in this certiorari proceeding.[6] In addition to their claim for breach of

[6] It is also noteworthy that much of petitioner's statement of the case often is supported not by references to the findings of

fiduciary duty under § 502(a)(3), respondents also contended below that they were entitled to vested lifetime benefits under the MF plan pursuant to § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) (1988). The claim for lifetime benefits was based on the fact that the summary plan description ("SPD") entitled "You and Massey Ferguson" did not disclose that petitioner reserved the right to amend or terminate the plan, while other representations made to respondents both in the SPD and elsewhere led respondents to believe that their benefits vested upon retirement and could not thereafter be reduced or terminated.

The district court rejected the claim for lifetime benefits under § 502(a)(1)(B) based on the finding that petitioner's reservation of the right to amend or terminate as set forth in the plan was enforceable. The court of appeals affirmed, holding that the language of the reservation of rights provision unambiguously conferred upon petitioner the right to amend or terminate the plan, and therefore was fatal to respondents' claim that "once they had retired from MF, their right to welfare benefits became vested for life." (PA 9a.) Thus, the only issue addressed in the context of the § 502(a)(1)(B) claim was

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fact but by citations to evidentiary material. One of the more significant examples of this is petitioner's citation to testimony suggesting that the only alternative to Project Sunshine was to close the CARE division and terminate plaintiffs' employment. (See petitioner's brief at 6, n. 7.) However, the district court made no finding of fact to that effect. Petitioner itself represented to employees only that it was "uncertain" whether MF could offer employment prospects comparable to those available at MCC. (JA 75.)

whether respondents were entitled to lifetime benefits. That claim was rejected, but respondents nevertheless established through their claim for breach of fiduciary duty their entitlement to reinstatement to the MF plan as it now exists, with such rights as appertain generally to members of the plan. (PA 23a.)

Petitioner's focus upon the dispute over the enforceability of its reservation of the right to amend or terminate the plan is thus misplaced. It is undisputed that the MF plan to which respondents are to be reinstated still exists and has never been terminated (PA 51a, ¶ 2), and petitioner's right to modify the plan still exists. (PA 23a.)

SUMMARY OF ARGUMENT

The existence of a right of individual recovery for breach of fiduciary duty is apparent from the plain language of § 502(a)(3), which authorizes participants or beneficiaries to bring actions to "redress . . . violations" or "to enforce *any* provisions" (emphasis added) of subchapter I of ERISA. Subchapter I includes § 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1) (1988 & Supp. 1993), the provision which sets forth the duties of an ERISA fiduciary. If Congress had not intended § 404(a)(1) to be actionable through § 502(a)(3), then in the exercise of the deliberate care with which it drafted ERISA's remedial provisions, it would have excepted § 404(a)(1) from the language of § 502(a)(3).

This construction of § 502(a)(3) in accordance with its plain meaning is supported by the fundamental purpose of ERISA and by the common law of trusts, to which

ERISA traces its roots. The purpose of ERISA is to "promote the interests of participants and their beneficiaries in employee benefit plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (quoting *Shaw v. Delta Airlines*, 463 U.S. 85, 90 (1983)). Under the common law of trusts, the duties of a trustee run directly to trust beneficiaries, and the right of individual recovery for breach of trust is recognized.

The legislative history of ERISA does not support petitioner's argument that § 409 of ERISA, 29 U.S.C. § 1109 (1988), as made actionable through § 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2) (1988), was intended to represent the exclusive source of a remedy for breach of a fiduciary duty. Petitioner and its *amici* argue, in effect, that although fiduciaries have a duty to act "solely in the interest of participants and beneficiaries," a breach of that duty which injures only individual beneficiaries, as opposed to the plan itself, should not be remediable. That Congress did not intend such a result is evident from the plain language of § 502(a)(3).

Petitioner breached its fiduciary duty to the Retired Class by making intentional, affirmative misrepresentations about the status and security of their benefits in connection with the solicitation of their consent to the transfer to MCC. Petitioner was not merely silent, but exercised its discretion to communicate with the Retired Class about these matters. Accordingly, this is not a case about whether there is a duty to disclose but rather about whether there is a duty not to lie. There can be no legitimate dispute that the duties of loyalty and prudence imposed upon ERISA fiduciaries encompass a duty not to lie to participants about the status of their benefits, which

in turn includes a duty not to make affirmative representations which are misleading because they are incomplete.

In making these misrepresentations, petitioner was acting in its fiduciary capacity as plan administrator because the misrepresentations related to benefits. The structure of ERISA and the nature of the position of plan administrator reflect that the act of communicating with participants about benefits is an inherently fiduciary function. The communications mandated by ERISA's reporting and disclosure scheme are not the only fiduciary communications contemplated by Congress. The SPD, "You and Massey Ferguson," also demonstrates that petitioner itself contemplated and invited additional, discretionary communications between participants and petitioner in its fiduciary capacity as plan administrator.

Petitioner's argument based on its disclosure of a right to amend or terminate the MF plan is inapposite because petitioner did not exercise any such right in connection with Project Sunshine. The MF plan still exists and has never been amended so as to eliminate benefits. Moreover, the court of appeals' decision does not undermine the distinction between pension plans and welfare plans with regard to vesting. Respondents have not been reinstated to vested benefits.

Finally, petitioner's argument that its misrepresentations to the Retired Class did not constitute a breach of fiduciary duty does not appear to challenge the court of appeals' ruling that petitioner breached its fiduciary duty to the individual respondents by purporting unilaterally to transfer to MCC petitioner's obligation to pay benefits

to the individual respondents. This act represented a breach of fiduciary duty because, among other reasons, the terms of the plan made no provision for such a transfer. Petitioner thus breached its fiduciary duty to administer the plan in accordance with the governing instruments.

ARGUMENT

I. PARTICIPANTS AND BENEFICIARIES HAVE A RIGHT OF INDIVIDUAL RECOVERY FOR BREACH OF FIDUCIARY DUTY UNDER THE PLAIN LANGUAGE OF § 502(a)(3).

Section 502(a)(3) of ERISA provides in pertinent part as follows:

> [A] civil action may be brought . . . by a participant [or] beneficiary . . . to enjoin any act or practice which violates any provision of this subchapter . . . or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of this subchapter. . . .

Section 404(a)(1) of ERISA, which sets forth the duties of a fiduciary, is a part of subchapter I of ERISA to which § 502(a)(3) refers. Thus, under the plain meaning of § 502(a)(3), a participant or beneficiary has a right of action to redress a fiduciary's violation of § 404(a)(1). Nothing in § 502(a)(3) prohibits such a participant or beneficiary from obtaining relief in his or her individual capacity.

Neither petitioner nor its *amici* appear to seriously dispute that the plain language of § 502(a)(3) supports respondents' right of individual recovery for breach of fiduciary duty. Giving effect to the plain meaning of a statute is, of course, the first principle of statutory construction. A court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (quoting *Park 'N Fly, Inc. v. Dollar Park 'N Fly, Inc.*, 469 U.S. 189, 194 (1985)). A court should always turn to this "cardinal canon" of statutory construction before all others; "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992), (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Thus, a party seeking to defeat the plain meaning of a statute bears an "exceptionally heavy burden." *Patterson v. Shumate*, 504 U.S. 753, 760 (1992).

The court of appeals' construction of § 502(a)(3) was guided by this fundamental principle ("the plain language of the statute certainly favors [respondents'] position" – PA 14a-15a). *Accord, In Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, No. 94-1875, 1995 WL 380983, at *8-*9 (3d Cir. June 28, 1995); *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 992-93(7th Cir. 1993).

No majority of this Court has yet had occasion to consider the question at hand. In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), upon which many of the arguments of petitioner and its *amici*

are founded, the plaintiff expressly disclaimed reliance on § 502(a)(3); accordingly, the majority had "no occasion to consider" whether that section authorized individual relief for breach of fiduciary duty. *Russell*, 473 U.S. at 139 n. 5. However, three justices joined with Justice Brennan in a concurring opinion indicating that § 502(a)(3) should be construed as authorizing actions by individual participants and beneficiaries for breach of fiduciary duty under § 404(a). The concurrence stated that:

> Section 502(a)(3) authorizes the award of "appropriate equitable relief" directly to a participant or beneficiary to "redress" *any* act or practice which violates *any* provision of this title or the terms of the plan. This section and section 404(a)'s fiduciary-duty standard both appear in Title I, which is entitled "PROTECTION OF EMPLOYEE BENEFIT RIGHTS." A beneficiary therefore may obtain "appropriate equitable relief" whenever an administrator breaches the fiduciary duty set forth in section 404(a).

473 U.S. at 153-54 (emphasis in original).[7]

[7] More recently, in *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), four justices joined in a dissenting opinion which also dealt with the question of whether a breach of fiduciary duty would be actionable under § 502(a)(3), although it had not been addressed by the parties and therefore was not the subject of the majority's holding. At footnote 1, the *Mertens* dissent wrote in pertinent part as follows:

> Section 502(a)(3) gives a cause of action to any participant, beneficiary or fiduciary of an ERISA-governed plan "to redress . . . violations" of the statute. There can be no dispute that when an ERISA fiduciary breaches his or her duty of care in managing the plan, there has been a violation of the statute. *See* 29 U.S.C. § 1104. The only question then is whether the remedies provided by § 502(a)(3) "to redress such [a] violatio[n]" must stop with the breaching fiduciary . . .

Mertens, 113 S. Ct. at 2073 n. 1 (Stevens, J., dissenting).

The fact that Congress chose to make the violation of *any* provision of subchapter I (which includes § 404(a)(1)) actionable through § 502(a)(3) strikes at the heart of one of the principal statutory construction arguments of petitioner and its *amici*. They note, as has the Court, that ERISA's remedial scheme was crafted with "deliberate care." *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *Russell, supra*, 473 U.S. at 174. That premise, however, can only lead to a conclusion directly opposite to that for which petitioner and its *amici* advance it. If in the exercise of such deliberate care Congress had intended that § 502(a)(3) should not be accorded its plain meaning – which would allow individual beneficiaries to obtain redress for breach of fiduciary duty – it could easily have excepted § 404(a)(1) from "the provisions of this subchapter," violations of *any* of which were made actionable by the language Congress did select. The fact that Congress exercised deliberate care in drafting the statute, and in so doing elected *not* to make such an exception, compels that it be construed in accordance with its plain meaning.

This plain language interpretation of § 502(a)(3) is further supported by the fundamental purpose of ERISA and the common law of trusts, to which ERISA traces its roots. The Court has noted that "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans.' " *Firestone Tire & Rubber Co. v.*

Bruch, 489 U.S. 101, 113 (1989) (quoting *Shaw v. Delta Airlines*, 463 U.S. 85, 90 (1983)). *See* § 2(b) of ERISA, 29 U.S.C. § 1001(b) (1988) ("It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts").

The Court also has repeatedly observed that ERISA – and its fiduciary responsibility provisions in particular – are rooted in the common law of trusts. *Firestone, supra*, 489 U.S. at 110-11; *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-72 (1985). The Court is therefore guided by principles of trust law in construing the statute. *Id.* As Justice Brennan noted in his concurrence in *Russell*, "it is black letter trust law that fiduciaries owe strict duties running directly to beneficiaries" in the administration of trusts. *Russell, supra*, 473 U.S. at 152-53 (citing *Restatement (Second) of Trusts* § 182 (1959) and G. Bogert and G. Bogert, *Law of Trusts* § 109 (1973)).[8] *See also, Restatement (Second) of Trusts* §§ 170 ("duty of loyalty"), 173 ("duty to furnish information"), and 174 ("duty to exercise reasonable care and skill"), all defining the duties of a trustee as being owed "to the beneficiary."

[8] The incorporation of this common law principle into ERISA is reflected not only in § 502(a)(3) but also in § 404(a)(1), which requires every fiduciary to discharge its duties "solely in the interest of participants and beneficiaries." *See also, Central States, supra*, 472 U.S. at 576 ("A trustee's duty extends to all participants and beneficiaries of a . . . plan").

The right of beneficiaries to obtain individual recovery for breach of fiduciary duty under appropriate circumstances thus was established at common law. *See Restatement (Second) of Trusts* § 197, *et seq.* (1959); *see, e.g., United States v. Mitchell*, 463 U.S. 206, 225-27 (1983). Because ERISA traces its roots to the common law of trusts, and because it is the purpose and expressly declared policy of ERISA to protect the interests of participants and beneficiaries in employee benefit plans, the Court has recognized that it would be anomalous to construe ERISA in a way that "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone, supra*, 489 U.S. at 114. *See also, Mertens, supra*, 113 S. Ct. at 2072 (Stevens, J., dissenting).

Petitioner does not dispute the relevance of the common law of trusts to the interpretation of ERISA. It argues instead that neither the law of trusts nor ERISA's fundamental purpose to protect the rights of beneficiaries can be used to "modify" the relief available under the statute. However, respondents do not resort to the common law of trusts or to the declared purpose of ERISA to "overcome the words of [ERISA's] text" (*cf. Mertens, supra*, 113 S. Ct. at 2071) or to support the recognition of any remedy by inference; rather, in this case, the common law of trusts and the declared purpose of the statute serve only to explain why Congress would have intended that § 502(a)(3) be construed exactly as it is written.

The statutory construction arguments of petitioner and its *amici* focus almost exclusively on the significance of § 409 of ERISA, 29 U.S.C. § 1109 (1988), and its authorization of breach of fiduciary duty recovery "to the plan."

Much emphasis is placed on the secondary principle of statutory construction that a provision specifically addressing an issue should be deemed to control over another addressing it in more general language. This argument proceeds from the erroneous premise that § 409, as made actionable through § 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2) (1988), is somehow in conflict with § 502(a)(3). However, there is no inherent conflict between the availability of recovery to the plan under §§ 409 and 502(a)(2) and the availability of appropriate equitable relief for breach of fiduciary duty to individual participants and beneficiaries under § 502(a)(3). Those remedies may properly be viewed as complementary, particularly in light of the fundamental purpose of ERISA. While giving effect to the plain language of § 502(a)(3) may result in some duplication of the remedies available to the plan under § 409 and § 502(a)(2), contrary to petitioner's argument the failure to recognize a right of individual recovery plainly would violate the principle that a statute should be construed so as to give effect to all of its provisions. Nothing in the court of appeals' construction of § 502(a)(3) would impinge upon the continued enforcement of § 409 for recovery to the plan under § 502(a)(2), but to construe § 409 as the exclusive source of a remedy for breach of fiduciary duty clearly would read out of § 502(a)(3) a critical feature of its plain meaning.

Petitioner also asserts that the legislative history of ERISA "confirms that the remedies ultimately placed in ERISA § 409 were intended to cover all actions for breach of fiduciary duty." (Petitioner's brief at 26.) As a threshold matter, where the language of a statute is clear, any argument based on legislative history is of minimal, if any, relevance. *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2149 (1995); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1229-30 (1995).

The legislative history of ERISA does not support petitioner's argument in any event. In particular, petitioner's assertion that § 502(a)(3) appeared relatively late in the legislative process (while § 409 was included in the first bill introduced) is unfounded. Each of the bills cited by petitioner, in fact, contained an antecedent of § 502(a)(3) to accompany the antecedent of § 409. *See* H.R. 2 (as introduced), 93d Cong., 1st Sess. § 106 (1973), *reprinted in* Leg. Hist. 3, 33 (Secretary may sue to enjoin violation of title); S. 4 (as introduced), 93d Cong., 1st Sess. § 603 (1973), *reprinted in* Leg. Hist. 93, 183 (participant or beneficiary may sue "for appropriate relief, legal or equitable, to redress or restrain a breach of any . . . duty of a fiduciary"); S. 1557, 93d Cong., 1st Sess. § 9 (1973) *reprinted in* Leg. Hist. 280, 303 (participant or beneficiary may sue "for appropriate relief, legal or equitable, to redress a breach of any . . . duty of a fiduciary"); S. 4 (as reported), 93d Cong., 1st Sess., § 603 (1973), *reprinted in* Leg. Hist. 389, 579 (participant or beneficiary may sue "for appropriate relief, legal or equitable to redress or restrain a breach of any . . . duty of a fiduciary"). Although the precise contours of the provision were altered in the legislative process and emerged as the language seen in § 502(a)(3), petitioner's suggestions that this provision was appended to ERISA by the Conference Committee as something of an afterthought, or only to

allow enforcement of ERISA's lesser "regulatory provisions," simply are not supported by the legislative history.

The legislative history of ERISA does establish some principles which have a bearing on the proper construction of § 502(a)(3). For example, as the Court has noted, the legislative history establishes that Congress intended to codify in ERISA principles of the common law of trusts, which in turn has led the Court to seek guidance in the common law in interpreting the statute. *See* H.R. Rep. No. 93-533, p. 11 (1973), *reprinted in* Leg. Hist. 2348, 2358 ("The fiduciary responsibility section, in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts"), *quoted in Firestone, supra,* 489 U.S. at 110.

The legislative history also is replete with statements reflecting Congressional intent that individual participants and beneficiaries would have the right to bring actions to redress violations of the statute – including its fiduciary duty provisions. *See, e.g., Joint Explanatory Statement of the Committee of Conference,* 120 Cong. Rec. 27,934 (1974), *reprinted in* Leg. Hist. 4519, 4594 ("Under the conference agreement, civil actions may be brought by a participant or beneficiary . . . for relief from breach of fiduciary responsibility"); 120 Cong. Rec. 29,933 (1974), *reprinted in* Leg. Hist. at 4745 ("Individual participants and beneficiaries will . . . be able to bring suit . . . to obtain redress of fiduciary violations") (statement of Sen. Williams); 120 Cong. Rec. 29,935 (1974), *reprinted in* Leg. Hist. at 4752 ("Employees would have the right to enforce new Federal rules of conduct applicable to those who manage pension and welfare funds") (statement of Sen.

Javits); H.R. Rep. No. 93-533, p. 17 (1973), *reprinted in* Leg. Hist. 2348, 2364 ("The enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations of the Act").

However, petitioner does not cite, and respondents have not found, anything in the legislative history which directly addresses the specific question of whether participants and beneficiaries were intended to have a right of individual recovery for breach of fiduciary duty. *Cf. United States v. Ron Pair Enterprises,* 489 U.S. 235, 240 (1989) ("it is not appropriate or realistic to expect Congress to have explained with particularity each step it took" in enacting sweeping legislation). In the face of such inconclusive legislative history, a court must return to the first premise of statutory construction – giving effect to the plain meaning of the words used by Congress. *Id.; Hubbard v. United States,* 115 S. Ct. 1754, 1761 (1995). That principle alone is more than sufficient to delineate the proper construction of § 502(a)(3).

Finally, a few comments are in order regarding some of the policy arguments raised by one of petitioner's *amici,* the Chamber of Commerce, as to the perceived consequences of recognizing a right of individual recovery for breach of fiduciary duty. The Chamber's brief suggests that one result of such recognition would be that breach of fiduciary duty claims would routinely be joined with run-of-the-mill benefit claims already cognizable under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) (1988). Section 404(a)(1) provides that one of the obligations of a fiduciary is to discharge his duties "in accordance with the documents and instruments governing the

plan." A failure to pay benefits owing under the terms of the plan therefore would also constitute a breach of fiduciary duty. Of course, that would be so regardless of whether § 502(a)(3) is construed as authorizing a right of *individual recovery* for a breach of the duties set forth in § 404(a)(1). Moreover, even if the Chamber's concern that the joinder of an alternative theory of recovery for the same conduct would significantly increase the cost of benefit litigation were well founded (which is subject to debate), this is the sort of policy concern better addressed to Congress in the first instance, and certainly is not sufficient to carry the "exceptionally heavy burden" of overcoming the plain language of § 502(a)(3).

The same is true of the Chamber's argument that recognition of a right of individual recovery for breach of fiduciary duty would create incompatible legal standards for courts hearing benefit claim disputes. Under *Firestone*, when the plan documents confer discretion upon a fiduciary, the fiduciary's claim denial decision may be overturned only for an abuse of discretion. The Chamber reasons that if an individual beneficiary has a right of recovery under § 502(a)(3), an inconsistent standard of review would be compelled because under § 404(a)(1) a fiduciary must discharge its duties "solely in the interest of the participants and beneficiaries." This argument again confuses the recognition of a right of *individual recovery* under § 502(a)(3) with the *existence of the duty* under § 404(a)(1) in the first instance. Even if the plain language of § 502(a)(3) did not provide for individual relief for breach of fiduciary duty, the fiduciary duty itself already undeniably exists under § 404(a)(1). This Court obviously was aware of the duties imposed by § 404(a)(1) when it decided the

Firestone case, and it did not regard the abuse of discretion standard (when appropriately authorized by the plan documents) as being incompatible with the fulfillment of those duties. Moreover, the abuse of discretion standard endorsed in *Firestone* itself was drawn directly from the common law of trusts (*see* 489 U.S. at 111) - - under which fiduciaries had the duty of loyalty now codified in § 404(a)(1), and under which they also were subject to liability to individual beneficiaries. Accordingly, the argument that giving effect to the plain meaning of § 502(a)(3) will create inconsistent standards of review for benefit litigation simply will not withstand scrutiny.

If anything, the policy arguments of petitioner and its *amici* serve to demonstrate the very incongruity of their position. On the one hand, they cannot deny that under § 404(a)(1) fiduciaries must discharge their duties prudently and "solely in the interest of the participants and beneficiaries," yet on the other they maintain that the breach of a fiduciary duty which causes injury not to the plan but only to an individual participant or beneficiary should not be remediable. To so hold in this case, as the court of appeals stated, "would leave unremedied an egregious wrong." (PA 16a.) That Congress could have intended such a result is inconceivable; that it did not intend such a result is evident from the plain language of § 502(a)(3).

II. PETITIONER BREACHED ITS FIDUCIARY DUTY NOT TO LIE TO PARTICIPANTS ABOUT BENEFITS.

Petitioner's argument on the second question presented in this certiorari proceeding at times strays so far from the genuine issues that its relation to this case is difficult to discern. Notwithstanding petitioner's consistent effort to characterize it as such, this is *not* a case about whether an ERISA fiduciary has a duty to disclose facts to beneficiaries beyond the specific mandatory disclosures enumerated in the statute. Rather, this case raises the question of whether, when an ERISA fiduciary exercises its discretion to communicate with beneficiaries about the status of their benefits, it has a duty to be honest in such communications. The unchallenged record in this case establishes that petitioner was not merely silent in the face of a duty to disclose, but rather that petitioner made *intentional, affirmative misrepresentations* to participants about the status and security of their benefits.[9]

[9] Petitioner's unwillingness to acknowledge the facts which have been conclusively established at this stage of the proceedings is particularly evident in this section of its argument. Petitioner suggests that the record reflects only "*claimed* wrongs" and that it "*allegedly* did not fully inform plaintiffs as to the likely future financial viability of MCC." (Petitioner's brief at 29, 32; emphasis added.) The distinction between "claimed wrongs" or "allegations" and unchallenged factual findings of fraudulent misrepresentation may elude petitioner, but it surely will not elude this Court.

Petitioner is intent upon characterizing its conduct as a failure to disclose rather than as affirmative misrepresentations because on the surface of the matter a "mere" failure to disclose would seem to fit better with petitioner's theory that it did not act in a fiduciary capacity, but rather only engaged in "business decisions" in its nonfiduciary capacity as an employer. Petitioner argues that if an employer which also serves as an ERISA fiduciary does not act in a fiduciary capacity when it makes business decisions regarding a plan, then its conduct does not take on a fiduciary character merely because, in the alleged absence of a duty to disclose, it elects not to communicate with plan participants about those decisions other than as expressly required by ERISA's reporting and disclosure scheme.

Petitioner's argument is fatally flawed in several respects, beginning, as noted above, with the fact that this case does not involve a mere failure to disclose facts relating to an employer's plan-related business decisions. Whether or not a fiduciary has a duty to communicate facts in the first instance, the relevant authorities consistently reflect that once it exercises its discretion to communicate about benefits (as petitioner did in this case), it enters into the realm of fiduciary responsibility and is subject to all of the attendant fiduciary duties.

The distinction between a mere business decision relating to a plan and the fiduciary function of communication to beneficiaries about the status of the plan is clearly reflected in the court of appeals' decision in this case (PA 12a-13a), as well as in the decisions of other courts of appeals. In *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), the court recognized that

"purely business decisions by an ERISA employer are not governed by section [404(a)(1)'s] fiduciary standards," but that an employer acting as plan administrator has a fiduciary duty not to make material misrepresentations to participants about its decisions with respect to the plan. *Id.*, 858 F.2d at 1163-64.

Decisions of the court of appeals for the Third Circuit also effectively illustrate the distinction between mere business decisions and the fiduciary act of communicating with beneficiaries. In *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990) (a case frequently cited by petitioner – see petitioner's brief at 31, 32, 33 and 35), the court held that an employer's decision to amend or terminate an employee benefit plan is "unconstrained by the fiduciary duties that ERISA imposes upon plan administration." *Id.*, 908 F.2d at 1162. However, *Hozier* did not involve allegations of misleading communications about the status of benefits. In four subsequent decisions, the Third Circuit made it clear that ERISA's fiduciary duties do apply when an employer communicates with plan participants about benefits. *See In Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, No. 94-1875, 1995 WL 380983 (3d Cir. June 28, 1995); *Curcio v. John Hancock Mutual Life Insurance Co.*, 33 F.3d 226, 232-35 (3d Cir. 1994); *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993); *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130, 133-35 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993). In the *Unisys* opinion, the court (citing *Hozier* as supporting authority) clearly articulated the principle at hand:

> When a corporate plan administrator speaks about benefits to its employees, the administrator acts in a fiduciary capacity even if he speaks about a nonfiduciary decision such as the business decision to terminate a welfare benefit plan.

Id. at *10, n. 10.

The fact that *communication* about benefits inherently is a fiduciary function is confirmed by the structure of ERISA. The role of a plan administrator within the framework of ERISA inherently is fiduciary in nature. The definition of a "fiduciary" expressly includes anyone who exercises *any* discretionary authority or discretionary responsibility *in the administration of a plan*. § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A) (1988) (emphasis added). Section 402(a)(1) of ERISA, 29 U.S.C. § 1102(a)(1) (1988), requires that the instrument establishing a plan shall provide for one or more "named fiduciaries" who "shall have authority to control and manage the . . . *administration* of the plan." (Emphasis added.) The advisory regulations published by the Department of Labor also state that "a plan administrator . . . must, b[y] the very nature of his position, have discretionary authority or discretionary responsibility in the administration of the plan within the meaning of § 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be fiduciaries." 29 C.F.R. § 2509.75-8 D-3 (1988).

The primary responsibility assigned to the fiduciary position of plan administrator under ERISA is *to communicate with participants and beneficiaries about the nature and status of their benefits*. It is the plan administrator, as such, who bears the responsibility for compliance with ERISA's

reporting and disclosure requirements. *See* §§ 101-104 of ERISA, 29 U.S.C. §§ 1021-1024 (1988 & Supp. 1993). The structure of ERISA itself thus indicates that the act of communicating with beneficiaries about the status of their benefits inherently is a fiduciary function, at least to the extent that any discretion is exercised in that process.

Petitioner apparently contends, however, that ERISA's reporting and disclosure obligations are exclusive in the sense that only in carrying out those specified disclosures could an employer be deemed to act in its fiduciary capacity as plan administrator. Any other benefit-related communications, petitioner would argue, cannot be deemed to be made in a fiduciary capacity because the making of any other communications is not required of the plan administrator/fiduciary by ERISA. As a threshold matter, this argument ignores the concept that one acts as a fiduciary when exercising *discretionary* authority or responsibility with regard to the administration of a plan. If anything, then, the fiduciary character of plan-related communications which the fiduciary *voluntarily elects* to make – an exercise of discretion – may be regarded as even more clearly a fiduciary function than the communications expressly required by ERISA.

The notion that ERISA's fiduciary duties do not extend to communications between fiduciaries and beneficiaries other than those communications specifically required in the reporting and disclosure provisions is patently untenable in any event. It is apparent from the typical complexity of employee benefit plans themselves and the continuously interactive nature of plan administration that discretionary communications between participants and fiduciaries (including employers acting in

the capacity of plan administrator) must occur on a regular basis in the course of plan administration.

This point is illustrated quite simply by the requirement of ERISA that an SPD include the name and address not only of the plan administrator but of all other fiduciaries of the plan. *See* § 102(b) of ERISA, 29 U.S.C. § 1022(b) (1988). The obvious purpose of including fiduciaries' names and addresses is to enable participants to communicate with the fiduciaries in some fashion. While the requirement of stating the name and address of the plan administrator might be explained in part by the fact that beneficiaries have the right, under ERISA's express disclosure provisions, to request or inspect certain documents through the plan administrator, the requirement of providing the names and addresses of other fiduciaries (upon whom the primary obligation to comply with express reporting and disclosure requirements is not imposed) can be explained only by the fact that other discretionary communications between beneficiaries and fiduciaries – to which ERISA's fiduciary duties would apply – were also contemplated by Congress. *See In Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, No. 94-1875, 1995 WL 380983, at *6 (3d Cir. June 28, 1995) ("satisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed to plan participants to communicate candidly if the plan administrator simultaneously or

subsequently makes material misrepresentations to those to whom the duties of loyalty and prudence are owed").[10]

It is apparent from the terms of petitioner's SPD, "You and Massey Ferguson," that petitioner itself plainly contemplated and indeed *invited* the regular occurrence of discretionary communications between participants and itself as plan administrator. In one passage in the SPD, petitioner stated that its designated group benefits administrators "are available to you or your survivors to assist and counsel as needed." (Pl. Ex. 114, section II, p. 7.) In another passage, petitioner encouraged beneficiaries to write or call the personnel administration office (which was designated to handle the day-to-day functions of plan administration) if they had "any questions concerning these benefits." (*Id.* at section VIII, p. 9.) Most importantly, in the section of the SPD describing participants' rights under ERISA, petitioner stated that "if you have any questions about your plan, you should contact the plan administrator." (*Id.* at section IX, pp. 4-5.)[11]

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[10] *Curtiss-Wright v. Schoonejongen*, 115 S. Ct. 1223 (1995) is cited by petitioner in part for the proposition that ERISA's scheme "for enabling beneficiaries to learn their rights and obligations" is "built around reliance on the face of written plan documents." However, *Curtiss-Wright* certainly did not hold that no other form of communication about benefits was contemplated under ERISA, or that when such communications occur they would not also be subject to ERISA's fiduciary duty provision. *Curtiss-Wright* did not, in any event, involve a claim of breach of fiduciary duty or any allegation of affirmative misrepresentation regarding the status of benefits.

[11] Another section of the SPD entitled "Benefit Administrators" also highlights the distinction at issue in this case. It states, in pertinent part, as follows:

Petitioner's own SPD thus acknowledges not only that communications between participants and the plan administrator were contemplated in addition to those specified in ERISA's reporting and disclosure scheme, but also that the act of communicating with beneficiaries about the plan was regarded by petitioner itself as a function to be carried out in its fiduciary capacity as plan administrator.

The conclusion that the act of communicating with the plan participants about the plan or the status of benefits thereunder inherently is a fiduciary function is further supported by the common law of trusts, in which ERISA is rooted. At common law, a trustee is subject to stringent and broadly defined duties with regard to communications with beneficiaries about matters relating to the trust. *See, e.g., Restatement (Second) of Trusts*, §§ 170(2), 173 (1959).

A final note is in order about the threshold issue of whether the petitioner acted in its fiduciary capacity in making the affirmative misrepresentations which are at issue in this case. Although petitioner does not expressly

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> Massey Ferguson, Inc. is the plan sponsor and administrator of the company's pension, savings, and welfare plans. The plan sponsor has *control* over the plans and the administrator is responsible for administering the plans.

(Pl. Ex. 114, section IX, p. 1.) This passage further illustrates the fact that while the employer may have control over decisions relating to the plan, the administration of the plan – which as shown elsewhere in the SPD includes communications with beneficiaries – is a function of the plan administrator. The latter is, in turn, inherently a fiduciary position.

raise the issue, there can be no legitimate doubt that its misrepresentations about MCC's financial health and outlook directly related to respondents' employee benefits. These and other intentional misrepresentations were made to implement Project Sunshine, which was specifically designed in part to rid petitioner of employee benefit obligations. The misrepresentations were made in the context of soliciting consent by the employees of the CARE division and retail stores to the transfer of their employment and benefit rights to MCC. In the case of a self-funded welfare benefit plan, the security of benefits is directly tied to the financial health of the employer/plan sponsor. If the employer is bankrupt, then there will be no source for the payment of any benefits. Thus, petitioner's fraudulent misrepresentations to the effect that MCC had a bright future went to the heart of the issue of the security of employee benefit rights for members of the Retired Class. As the district court found, the Retired Class relied to their detriment upon these and other affirmative misrepresentations in accepting the transfer of their employment and benefit rights to MCC.

Because petitioner was necessarily acting in its fiduciary capacity in communicating with employees about their benefits, the only remaining issue is the nature of the fiduciary duties attendant to such communications. Several courts which have considered the issue have held, drawing on the common law of trusts, that the fiduciary duties of loyalty and prudence imposed by § 404(a)(1) impose not only a *negative* duty not to misinform, but also an *affirmative* duty to inform when the fiduciary knows that its silence might be harmful to the

beneficiary. *See, e.g., Bixler v. Central Pennsylvania Teamsters Health and Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993); *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 991-92 (7th Cir. 1993); *Eddy v. Colonial Life Insurance Co.*, 919 F.2d 747, 750-51 (D.C. Cir. 1990).

While the imposition of an affirmative duty of disclosure seems eminently reasonable and plainly consistent with the common law of trusts (*see Restatement (Second) of Trusts* §§ 170(2), 173 (1959)), the Court need not decide that issue here because, as noted above, this case involves affirmative misrepresentations and not mere silence or omissions. The authorities are uniform as to the existence of a fiduciary duty not to affirmatively misinform a beneficiary. *See, e.g., Mullins v. Pfizer, Inc.*, 23 F.3d 663, 668-69 (2nd Cir. 1994); *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130, 133-35 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993).[12] As succinctly stated by Judge Posner in *Peoria Union Stock Yards Co. v. Penn Mutual Life Insurance Co.*, 698 F.2d 320, 326 (7th Cir. 1983), "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA, 29 U.S.C.

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[12] A corollary of the duty not to make affirmative representations is the rule that affirmative representations are deemed fraudulent not only when they are patently false but when the maker knows they are misleading because of its failure to state additional or qualifying matter. *See Restatement (Second) of Torts*, § 529 (1977). This rule is distinct from the question of whether there is a duty to disclose in the first instance, i.e., whether mere silence can give rise to a cause of action for fraudulent breach of fiduciary duty. *Cf. Restatement (Second) of Torts*, § 551 (1977).

section 1104(a)(1)." The proposition hardly seems debatable, and petitioner cites no authority calling it into question.

There seems little need for resort to legislative history on a point of such clarity, but what little legislative history there is on the matter confirms the obvious – that ERISA was intended, in part, to prevent dishonesty in the administration of employee benefit plans. 120 Cong. Rec. 4780 (1974), *reprinted in* Leg. Hist. at 3590 (fiduciary standards were intended "to prevent abuses in the management of pension plan funds . . . and other unwise and dishonest financial dealings") (statement of Rep. Drinan); 120 Cong. Rec. 29,935 (1974), *reprinted in* Leg. Hist. at 4751 (ERISA was motivated by Congress's "sense of indignation and frustration over what often seemed to be a cynical disregard of fundamental American concepts of fairness and decency by some of those who managed the private pension funds") (statement of Sen. Javits); 120 Cong. Rec. 29,951 (1974), *reprinted in* Leg. Hist. at 4795 ("This bill will establish judicially enforceable standards to insure honest, faithful and competent management of pension and welfare funds") (statement of Sen. Bentsen).

As noted above, most of petitioner's argument on the question of whether its conduct constituted a breach of fiduciary duty dwells on matters which are really inapposite to that issue. Petitioner focuses in particular on the evidence as to its disclosure of a reserved right to amend or terminate the plan, and on the assertion that the court of appeals' decision in this case is somehow inconsistent with ERISA's vesting rules. Only a few comments are in order regarding those aspects of petitioner's argument.

Petitioner's focus upon the evidence regarding its disclosure of a reserved right to amend or terminate the plan is misplaced because among the unchallenged findings of the district court was the fact that petitioner has never acted to terminate the MF plan, or amended it in a way to eliminate welfare benefits. (PA 51a, ¶ 2.) Instead, petitioner fraudulently induced the employees of the CARE division and retail stores (including the respondents now identified as the Retired Class) to accept a transfer of their benefit rights from the MF plan to the MCC plan. This strategy was, of course, absolutely essential to petitioner's implementation of Project Sunshine, because it was necessary for the sham corporation to have employees in order to give the appearance of legitimacy to lenders (whose consent to the transfer of debt was required) and others. It would not have suited petitioner's purpose to simply terminate the plan (which also could have caused substantial disruption of its relationship with employees of other divisions whom it wished to retain) or to attempt to selectively amend it to exclude CARE division and retail store employees from its coverage. Whatever its motivation, the fact is that petitioner *did not exercise* a right of termination, and it cannot justify the achievement of its ends by saying it could have deprived respondents of their benefit rights by some theoretically permissible means other than the fraudulent means which it actually employed.

Petitioner's emphasis upon the reservation of a right to amend or terminate also is misplaced to the extent it relates to the argument that respondents cannot recover benefits under a breach of fiduciary theory which they could not recover under § 502(a)(1)(B). As noted in

respondents' statement of the case, respondents unsuccessfully sought to recover *lifetime* benefits under § 502(a)(1)(B) based on petitioner's failure to disclose in "You and Massey Ferguson" the reservation of the right to amend or terminate the plan. Respondents did not succeed on their claim for lifetime benefits because the district court concluded, and the court of appeals affirmed, that the reservation of rights in the plan itself was enforceable and that respondents' benefits therefore did not vest upon retirement. Only this claim of entitlement to lifetime benefits was litigated in the context of § 502(a)(1)(B). However, success on their breach of fiduciary duty claim nevertheless entitled respondents to be reinstated to the MF plan as though their transfer to MCC had not occurred. Thus, there is no logical inconsistency between the denial of recovery under § 502(a)(1)(B) (given the courts' conclusions) and the award of relief for breach of fiduciary duty.

Petitioner's focus upon the distinction between vesting rules applicable to pension and welfare plans is equally inapposite, and its argument that the court of appeals' decision "eviscerates" the distinction between pension and welfare plans in that regard is unfounded. The remedy for petitioner's breach of fiduciary duty, as modified by the court of appeals, simply was to reinstate respondents to the MF plan. Respondents have not been reinstated with vested or lifetime benefits. The court of appeals has clarified that respondents have only such rights as other members of the MF plan as it now exists, and petitioner's right to modify the plan still exists in accordance with the opinion. (PA 23a.) Accordingly, the court of appeals' decision simply does not impinge upon, let alone eviscerate, the distinction between pension plans and welfare plans with regard to vesting. Nor should anything in the result of this case serve to discourage employers from offering welfare benefits. The only thing it will, hopefully, serve to discourage them from doing is lying to their employees about the status of such benefits.

Finally, it is very important to note that petitioner's argument that it did not breach its fiduciary duty to respondents appears to address only the claim of the Retired Class. The claim of the Retired Class was based upon the fraudulent misrepresentations made to induce their consent to the transfer to MCC. The claims of the 10 individual respondents, however, are quite different. No misrepresentations were made to the individual respondents in connection with the transfer to MCC of petitioner's obligation to pay benefits to these respondents. Indeed, no disclosure of any kind was made. The 10 individual respondents already had retired from employment with petitioner at the time MCC was formed. Their consent to the transfer never was sought or obtained, and they learned of the transfer only after they stopped receiving benefits when MCC went into receivership. The court of appeals found that "such a complete disregard of the rights and interests of beneficiaries is a clear breach of fiduciary duty in violation of section [404(a)(1)]." (PA 17a.) Petitioner's conduct with respect to the individual respondents constituted a breach of the fiduciary duties of loyalty and prudence, as well as of the duty to administer the plan in accordance with the governing instruments. The latter is true simply because nothing in the plan documents authorized the "transfer" of petitioner's

benefit obligations to a retiree to another entity. Again, petitioner might in theory have attempted to achieve the same result by either amending or terminating the plan, but the fact is that it did not do so. While petitioner's argument on the right of individual recovery under § 502(a)(3) affects the individual respondents as well as the Retired Class, petitioner's argument as to whether it committed a breach of fiduciary duty does not appear to challenge the validity of the court of appeals' decision as it relates to the individual respondents. Petitioner in any event certainly has not identified any error in the holding as it relates to those respondents.

CONCLUSION

The decision of the court of appeals should be affirmed in its entirety.

Respectfully submitted,

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No. 94-1471 (13)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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I.

BREACH OF FIDUCIARY DUTY CLAIMS MAY ONLY BE COMMENCED ON BEHALF OF PLANS, NOT INDIVIDUALS

There is no dispute in this action about what the relevant sections of ERISA say. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)

(1988), permits a civil action to be commenced by a participant or beneficiary: plaintiffs are participants and beneficiaries. Section 502(a)(3) authorizes "appropriate equitable relief" to redress acts that violate "any provision of this subchapter." Plaintiffs seek equitable relief.

What is at issue here, however, is not whether plaintiffs may seek such relief. It is whether they may seek relief for themselves or whether they may do so only on behalf of a plan. The answer to that question is not to be found in the language of § 502(a)(3) itself: like the language of ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988), which also permits civil actions to be commenced by "a participant, beneficiary or fiduciary", the language in § 502(a)(3) permitting claims by the same people simply does not itself address the question of whether claims for breach of fiduciary duty may be asserted on behalf of individuals.[1] The assertion that the "unqualified text" of § 502(a)(3) permits "individualized relief" (Brief *Amicus Curiae* of the United States ("U.S. Br.") 9) is simply not supported by the text of the section.

The answer to the question of whether § 502(a)(2) permitted individual claims was held in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), to be found in ERISA § 409, 29 U.S.C. § 1109 (1988), a section referred to explicitly in § 502(a)(2) and one that this Court held was limited to plan-related relief. So with § 502(a)(3); focus must be directed to the specific provision that provides the basis of the claim.

[1] Like the opposition here, the Ninth Circuit in *Russell* had maintained that, based upon the plain language of § 502(a)(2), a "participant" or "beneficiary" could recover "appropriate equitable or remedial relief." *Russell* v. *Massachusetts Mutual Life Insurance Co.*, 722 F.2d 482, 490 (9th Cir. 1983), *rev'd*, 473 U.S. 134 (1985). In noting Congress's intent that "actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole," *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 142 n.9 (1985), however, this Court refused to allow the specific, plan-based remedies set forth in the the statute to be overcome by the generalized language referring to " 'equitable or remedial relief as the court may deem appropriate.' " 473 U.S. at 140.

According to plaintiffs and their *amici* allies, that provision is ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1988 & Supp. V 1993). But § 404(a) sets forth, by its terms, only what it characterizes as the "prudent man standard of care"; it says no more. It offers no provision for liability; it sets forth no remedies.[2] Liability under and remedies for breach of the standard of care set forth in § 404(a)(1) are explicitly and unambiguously imposed by § 409.

Plaintiffs' argument that notwithstanding § 409, a claim under § 404(a)(1) may be asserted by an individual for non-plan-based relief simply avoids the plain language of the statute. Section 409, entitled "Liability for breach of fiduciary duty", is the provision that "makes fiduciaries liable for breach" of the duties set forth in § 404(a)(1). *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063, 2066 (1993). On its face, § 409 addresses the universe of breach of fiduciary duty issues—the existence of and circumstances for imposing liability, the circumstances when no liability may be imposed, and the remedies for a breach. Section 409(a) is addressed to "*[a]ny* person who is a fiduciary with respect to a plan who breaches *any* of the responsibilities, obligations, or duties imposed" by Title I of ERISA. ERISA § 409(a), 29 U.S.C. § 1109(a) (1988) (emphasis added).[3] Section 409(b) provides

[2] The legislative history confirms that the principles embodied in § 404(a)(1) were not about remedies at all. That section simply "incorporate[d] core principles of fiduciary *conduct*." S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973), *reprinted in* Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of Employee Retirement Income Security Act of 1974* ("Leg. Hist.") 587, at 616 (Comm. Print 1976) (emphasis added). *See* G. Bogert, *Trusts* § 95, at 343 (6th ed. 1987) (trustee's duty of loyalty is distinct from remedies for breach of duty).

[3] The United States asserts that the language of § 404(a)(1) referring to a fiduciary "with respect to a plan" suggests individualized relief. (U.S. Br. 11 n.11) But the language cuts in precisely the opposite direction. Under *Russell*, § 409 provides only plan-based remedies. Section 409(a) employs precisely the same language as § 404(a), making liable a "fiduciary with respect to a plan". *See Russell*, 473 U.S. at 140 ("the

that a fiduciary will not be liable for any breach if it was "committed before he became a fiduciary or after he ceased to be a fiduciary." ERISA § 409(b), 29 U.S.C. § 1109(b) (1988). Given Congress's considered decision to include § 409 to provide the explicit means of imposing liability (and remedies) for breach of fiduciary duty, the notion that liability may be imposed under a provision—§ 404(a)(1), which articulates nothing more than a standard of care, the violation of which is expressly made actionable under § 409—is inconsistent with the plainest of plain-language statutory readings.

Even were the statutory language of the part of ERISA dealing with fiduciary duties less clear, the very specificity of § 409 should be held under long-standing principles of statutory interpretation to bar plaintiffs' claim. *E.g.*, *HCSC-Laundry* v. *United States*, 450 U.S. 1, 6, 8 (1981) (per curiam); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957); *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932). (Brief of Petitioner ("Pet. Br.") 21-22) Plaintiffs and their *amici* insist that the rule of these cases only applies where some sort of "conflict" or "dissonance" exists between general and specific statutory provisions. (*See* Brief of Respondents ("Pl. Br.") 24; U.S. Br. 14) But that simply begs the question. Dissonance there was, for example, in *HCSC Laundry*—but only because giving effect to the general provision would have allowed a broader exemption than that plainly available under the specific provision. 450 U.S. at 6, 8. The same is true here.

relevant fiduciary relationship [is] characterized at the outset as one 'with respect to a plan' "); *accord Farr* v. *US West, Inc.*, 58 F.3d 1361, 1364 (9th Cir. 1995) ("[U]nder § 1104 as well as § 1109, plaintiffs' recovery 'is limited to relief protecting the integrity of the plan as a whole and does not extend to individual participants.' "). Under the United States' reading, the phrase "with respect to a plan" would have different meanings in nearby subsections of the same subchapter. It is not a statutory reading favored by this Court with respect to ERISA, *Mertens*, 113 S. Ct. at 2070, or any other statute. *E.g.*, *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992).

Because § 409 is the liability provision for breach of fiduciary duty, it necessarily follows that while an individual may sue under § 502(a)(3) for breach of fiduciary duty, he or she must meet the § 409 standards set forth by this Court in *Russell*.[4] That being so, an individual may only sue on behalf of a plan.[5]

Two of plaintiffs' *amici* attempt to harmonize the plan-based limitations set forth in §§ 409 and 502(a)(2) with the notion of individualized cause of action for breach of fidu-

[4] Plaintiffs' approach to the statute—reading generalized phrases of ERISA in isolation to apply to a given issue, without regard to what Congress has said elsewhere in detail on that very issue—was also rejected by this Court in *Mertens*. There, a majority of the Court expressed skepticism that any cause of action exists under § 502(a)(3) for a non-fiduciary's participation in a fiduciary's breach of duty. Petitioners and their *amici*, including the United States, had argued in that case that the non-fiduciary plainly had engaged in activities violative of subchapter 1 of ERISA, and so could assert a claim under § 502(a)(3). (Brief of the United States as *Amicus Curiae*, *Mertens* v. *Hewitt Associates*, No. 91-1671, dated Nov. 1992 ("U.S. *Mertens* Br.") 9) The Court acknowledged that "ERISA contains various provisions that can be read as imposing obligations upon non-fiduciaries," 113 S. Ct. at 2067, but noted that "no provision explicitly requires them to avoid participation . . . in a fiduciary's breach." *Id.* The Court emphasized, moreover, that it was "unlikely . . . this was an oversight, since ERISA does explicitly impose 'knowing participation' liability on cofiduciaries." *Id.*

[5] *Accord, e.g.*, *Farr* v. *US West, Inc.*, 58 F.3d at 1364; *Whisman* v. *Robbins*, 55 F.3d 1140, 1149 (6th Cir. 1995); *Vespasian* v. *Sweeney*, No. 93-4343, 1995 WL 154982, at *6 n.3 (6th Cir. Apr. 6, 1995) (unpublished disposition); *Kayes* v. *Pacific Lumber Co.*, 51 F.3d 1449, 1462 (9th Cir. 1995) (dicta), *petition for cert. filed*, No. 95-220, 64 U.S.L.W. 3103 (Aug. 7, 1995); *McLeod* v. *Oregon Lithoprint Inc.*, 46 F.3d 956, 960 (9th Cir. 1995); *Adcox* v. *Teledyne, Inc.*, 21 F.3d 1381, 1390 (6th Cir.), *cert. denied*, 115 S. Ct. 193 (1994); *Armstrong* v. *Jefferson Smurfit Corp.*, 30 F.3d 11, 13 (1st Cir. 1994) (expressing skepticism that § 502(a)(3) allows individualized relief); *Simmons* v. *Southern Bell Telephone & Telegraph Co.*, 940 F.2d 614, 617 (11th Cir. 1991); *Horan* v. *Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1417 (9th Cir. 1991); *Bryant* v. *International Fruit Product Co.*, 886 F.2d 132, 135 (6th Cir. 1989) (per curiam); *Sokol* v. *Bernstein*, 803 F.2d 532, 536 (9th Cir. 1986); *Richards* v. *General Motors Corp.*, 850 F. Supp. 1325, 1336-41 (E.D. Mich. 1994).

ciary duty under § 502(a)(3) by suggesting that because Congress was somehow more concerned with plan-related mismanagement, it provided a broader category of relief in § 409 than the "more limited" equitable relief available under § 502(a)(3). (U.S. Br. 14; *see* Brief *Amicus Curiae* of the American Association of Retired Persons 12) This is *post hoc* rationalization in the extreme: by this reading, Congress not only intended to establish two separate categories of relief for breach of fiduciary duty—something for which there is absolutely no support in the legislative history[6]—but did so by enacting a subsection, § 409, entitled "[l]iability for breach of fiduciary duty", which authorized relief for only one of the two categories. Particularly with reference to a statute so carefully drafted, it is difficult to credit the notion that Congress sought to calibrate different categories of liability and relief to different types of fiduciary duty claims but simply did not say so.[7]

Nor is any "gap" left on the enforcement scheme by limiting to plan-based remedies claims for breach of the duties set forth in § 404(a)(1). ERISA directly and unambiguously addresses Congress's central concern as to individuals: the provision of promised benefits. *See Russell*, 473 U.S. at 142. Section 502(a)(1)(B) authorizes an individual participant or beneficiary to bring a civil action "to recover benefits due to

[6] Indeed, the extensive legislative history reviewed by this Court in *Russell* makes clear that Congress did not differentiate between individualized and plan-based actions in imposing liability and providing remedies for breach of fiduciary duty. 473 U.S. at 141 n.8.

[7] We note that the United States' latest look at congressional intent in this respect (*see* U.S. Br. 14) conflicts with the position it took before this Court two years ago in *Mertens*. In *Mertens*, the United States argued that in providing for "equitable relief" under § 502(a)(3), Congress intended to include recovery of damages. (U.S. *Mertens* Br. 13-14) Reading the statute that way—to allow individuals suing under § 502(a)(3) to recover damages also recoverable under § 502(a)(2), *Mertens*, 113 S. Ct. at 2070—is hardly consistent with the the United States' current assertion that Congress deliberately chose to *limit* individualized relief in § 502(a)(3) so as not to permit damage awards. (U.S. Br. 14.)

him under the terms of his plan, to enforce his rights under the terms of this plan, or to clarify his rights to future benefits under the terms of his plan . . . ." ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1988). This language is broad indeed, is directly addressed to the recovery of benefits and incorporates fiduciary standards of conduct;[8] it authorizes the awarding of benefits through a variety of remedial devices, including declaratory judgment, injunction, or monetary relief. *Russell*, 473 U.S. at 147; *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 108 (1989); *Novak* v. *Andersen Corp.*, 962 F.2d 757, 759 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2928 (1993).[9] In this case, plaintiffs sought and failed to

[8] The rights and remedies codified in § 502(a)(1)(B) are themselves derived from the common law of trusts, *see Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-11 (1989), and "[c]ourts generally apply trust law principles derived from state and federal common law in interpreting plan documents and adjudicating benefit claims." *Employee Benefits Law*, at 207 (S. Sacher, J. Gibbs, H.J. Shapiro, *et al.* eds. Supp. 1994). Even where a benefit plan gives an administrator "fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan", *Firestone*, 489 U.S. at 115, when the "administrator or fiduciary is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining an abuse of discretion.'" *Id.* at 115. Thus, Justice Brennan's concern expressed in his *Russell* concurrence that there be "enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans," *Russell*, 473 U.S. at 158, was addressed by this Court's decision in *Firestone*. (Of course, Justice Brennan's other query—"whether and to what extent extracontractual damages are available under § 502(a)(3)", 473 U.S. at 150—was answered by *Mertens*: they are not. *Mertens*, 113 S. Ct. at 2068).

[9] Complementing its broad remedies for obtaining benefits, § 502(a)(1) also addresses Congress' concern that individuals obtain information so as to ensure that they "know[ ] exactly where [they] stand[ ] with respect to the plan." H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973), *reprinted in* Leg. Hist. 2348, at 2358. Section 502(a)(1)(A), 29 U.S.C. § 1132(a)(1)(A) (1988), allows a participant or beneficiary to initiate a civil action to obtain the monetary award provided in ERISA § 502(c), 29 U.S.C. § 1132(c) (Supp. V 1993). That section provides that an administrator who refuses to comply with requests for required information shall be "personally liable *to such participant*

establish an entitlement to benefits under § 502(a)(1)(B). They did not seek a writ on that issue.

The decision in this case, in fact, well demonstrates that permitting recovery under a § 404(a)/§ 502(a)(3) nexus that is barred under § 409 (and its corresponding civil enforcement provision, § 502(a)(2)) threatens to swallow entirely the long-standing body of law under which individuals can seek benefits via § 502(a)(1)(B). In the past two decades, literally hundreds of decisions from all the circuits have delineated a comprehensive body of rules applicable to claims for the recovery of, or eligibility for, benefits—rules based in the first instance upon the written plan terms themselves and which limit and qualify the circumstances under which plaintiffs can obtain benefits.[10] These rules should have been dispositive in this case; the court of appeals concluded that plaintiffs were not entitled to benefits under § 502(a)(1)(B). (PA 8a-9a) Nonetheless, the court awarded the same benefits to plaintiffs under § 502(a)(3). (PA 18a) However that relief is characterized—as "damages" or as "restitution"—one thing cannot be disputed: the only relief plaintiffs obtained was benefits under the MF Plan. *That* relief is plainly the domain of § 502(a)(1)(B). *See Livolsi* v. *Ram Construction Co.*, 728 F.2d 600, 603 (3d Cir. 1984) (where plaintiffs "seek back benefits owed them personally" as opposed to suing "as representatives of the trust fund", § 502(a)(1)(B) is appropriate remedial vehicle, not 502(a)(3)).

Plaintiffs and their *amici* devote pages of argument to the proposition that § 502(a)(3) is the last line of defense for individuals aggrieved by rapacious employers. (*E.g.*, Pl. Br. 24, 26-27, 29; U.S. Br. 15; Brief *Amicus Curiae* of National Association of Securities and Commercial Law Attorneys 22-25) Tellingly, not a single case they cite, nor even a single hypothetical they postulate, involves the pursuit of anything other than benefits or eligibility for benefits. But § 502(a)(1)(B) itself exists to assure that benefits are paid when they are owed, *Russell*, 473 U.S. at 144. Using § 502(a)(3) as an end run around the provisions of § 502(a)(1)(B) is as unacceptable as using it to avoid the strictures of § 502(a)(2).[11]

or beneficiary in the amount of up to $100 a day" and that the administrator shall be subject to "such other relief" as the court deems proper. ERISA § 502(c)(1), 29 U.S.C. § 1132(c)(1) (Supp. V 1993) (emphasis added).

[10] Thus, claims for benefits are determined by the written plan terms and only where those terms are ambiguous will courts admit extrinsic evidence—oral representations, past practice, informal writings—to discern whether employees were promised benefits, or to give effect to their reasonable expectations. *E.g.*, *Averhart* v. *US West Mangement Pension Plan*, 46 F.3d 1480, 1485-86 (10th Cir. 1994). When plan administrators enact invalid amendments to plans, courts have refused to give effect to such amendments. *E.g.*, *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163-64 (3d Cir. 1990).

[11] Nor does reading § 404(a)(1) in light of § 409—which is, after all, the liability provision Congress explicitly enacted—"read out of § 502(a)(3)" any "critical feature". (Pl. Br. 24) Section 502(a)(3) provides a broad range of civil actions for violations other than those made sanctionable in § 409. For example, an employee wrongfully discharged in violation of ERISA § 510, 29 U.S.C. § 1140 (1988), may seek back pay, reinstatement, front pay or other equitable relief. *E.g.*, *Schwartz* v. *Gregori*, 45 F.3d 1017 (6th Cir. 1995), *petition for cert. filed*, No. 94-2035, 63 U.S.L.W. 3892 (June 12, 1995); *Kross* v. *Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983). Fiduciaries, as well as individuals, may sue employers under § 502(a)(3) to compel payments to multiemployer plans where non-fiduciary employers violate ERISA § 515, 29 U.S.C. § 1145 (1988). *E.g.*, *Carpenters Southern California Administrative Corp.* v. *Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984); *Molina* v. *Mallah Organization, Inc.*, 804 F. Supp. 504 (S.D.N.Y. 1992). (*See* Pet. Br. 25-26)

II.

VARITY WAS NOT ACTING IN ITS FIDUCIARY CAPACITY IN COMMUNICATING WITH EMPLOYEES AS TO MCC'S PROSPECTS

Should this Court hold that ERISA allows individual relief for a breach of fiduciary duty under § 502(a)(3), this case then raises the question of whether Varity's communications with its employees were fiduciary in nature and could thereby result in a breach of fiduciary duty. After concessions necessitated by the law and the facts, the opposition briefs have narrowed the issue here to conduct—Varity's affirmative representations of MCC's future financial viability—that falls well outside the purview of ERISA fiduciary conduct under the statutory provisions and legal principles that govern here.

The key legal propositions with which to begin the analysis are not in dispute: Under the functional definition of "fiduciary" in ERISA § 3(21)(A) "a person is a fiduciary with respect to a plan *to the extent* . . . he has any discretionary authority or discretionary responsibility *in the administration of such plan*". ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988) (emphasis added). Thus, an employer who also acts as a plan administrator does not for that reason act in a fiduciary capacity for all purposes and at all times. *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1228 (1995); *see Mertens*, 113 S. Ct. at 2072. Moreover, " '[a] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.' " *Curtiss-Wright*, 115 S. Ct. at 1228 (quoting *Adams* v. *Avondale Industries, Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990)). All agree that such business decisions fall outside the definition of "plan administration". *See Musto* v. *American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988) ("There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be."), *cert. denied*, 490 U.S. 1020 (1989).

There is consensus, as well, that, as the United States puts it, "the express requirements of the Act provide the basic structure for plan administration." (U.S. Br. 27) ERISA has erected an elaborate scheme of regulations "built around reliance on the face of written plan documents". *Curtiss-Wright*, 115 S. Ct. at 1230.[12] The administrator has a duty to "run the plan in accordance with the currently operative, governing plan documents." *Id.* at 1231. It is firmly established that the obligation of employers to continue to provide welfare benefits depends solely upon the terms of the applicable benefits documents; any entitlement to benefits is governed by ordinary principles of contract interpretation. (*See* Pet. Br. 34 (collecting cases))[13]

To effectuate the statute's written plan mandate, Congress enacted a "thorough" "informational scheme" of reporting and disclosure obligations. *Curtiss-Wright*, 115 S. Ct. at 1231. ERISA requires employers to distribute summaries of the current plan and requires them to make available for inspection all "*currently* operative, governing plan documents." *Id.* at 1230-31 (emphasis added; citing ERISA §§ 102-104, 29

[12] Thus, an ERISA fiduciary must establish a plan through a "written instrument", ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (1988), and must "discharge his duties . . . in accordance with the documents and instruments governing the plan". ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (Supp. V 1993).

[13] The purpose behind reliance on written plan documents is simple and is at the heart of the statute:

> "Were all communications between an employer and plan beneficiaries to be considered along with SPDs as establishing the terms of a welfare benefits plan, the plan documents and the SPDs would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost, and, consequently substantial disincentives for even offering such plans would be created."

Moore v. *Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *accord, e.g., Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851, 857 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1442 (1995).

U.S.C. § 1022-1024 (1988 & Supp. V 1993)). That scheme not only does not require an employer to tell employees whether it intends in the future to terminate benefits, it explicitly contemplates that employees need *not* be told of such impending events. Under ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1) (1988 & Supp. V 1993), any modification or change to benefits need not be disclosed until 210 days *after* the end of the plan year in which the change was implemented. *See Curtiss-Wright*, 115 S. Ct. at 1230.

The court below affirmed a breach of fiduciary duty based on (i) misleading statements as to MCC's financial future; (ii) failure to provide more complete information on the risks of accepting employment with MCC; and (iii) a supposed failure to repeat the reservation of the right to amend or terminate benefits. (PA 3a-5a) Again, the opposing briefs have usefully narrowed the issues.

Unable to address petitioner's demonstration that ERISA's affirmative disclosure obligations are expressly enumerated in the statute and that those obligations had been met (*see* Pet. Br. 36-40), plaintiffs and the United States have virtually abandoned any argument that Varity breached any fiduciary duty by failing to disclose facts to its employees. (Pl. Br. 30 ("this is *not* a case about whether an ERISA fiduciary has a duty to disclose facts to beneficiaries beyond the specific mandatory disclosures enumerated in the statute"); *see* U.S. Br. 21-22 & n.19)[14]

[14] The detail and clarity of ERISA's reporting and disclosure provisions strike at the heart of any argument that an employer acts as a fiduciary under § 404(a)(1) when it fails to disclose its intent to change plan terms, a proposition which underlies nearly all of the cases plaintiffs cite. (*See* Pl. Br. 39). Where ERISA has spoken directly to *what* must be disclosed and *when*, using the general language of § 404(a) to impose new disclosure duties would render the express disclosure provisions nugatory. *See Porto* v. *Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) (per curiam) ("The fiduciary duty imposed by ERISA is generally applied to the management of plan assets. . . . A plan administrator's duty to disclose information to plan participants is another matter, dealt with sep-

As to misrepresentations,[15] conspicuously absent from the opposing briefs—and from the decisions below—is any assertion that Varity misrepresented benefit *plan terms*. Indeed, as the United States concedes, the only affirmative representation at issue specifically about *benefits*—that benefit programs would "remain unchanged" from MF to MCC—was *true*. (U.S. Br. 26 n.23; *see* Pet. Br. 7) Neither court below found that Varity had misrepresented plan terms or that the plan had promised lifetime benefits.[16] Neither court found that the MCC Plan itself was "administered" in any way other than in accordance with its terms, or that while MCC was in existence, plaintiffs were not provided with all of the benefits to which they were entitled under that plan. And it is undisputed that plaintiffs were told of the reserved right to amend or terminate benefits in 1983, well before they lost benefits.[17]

arately by ERISA."), *cert. denied*, 485 U.S. 937 (1988); *cf. Curtiss-Wright*, 115 S. Ct. at 1229 (no duty to disclose detailed procedure for amending plan).

The opposition's repeated references to trust principles to justify imposing additional fiduciary duties (Pl. Br. 37, 38-39; U.S. Br. 20-23 & nn.18, 19) cannot overcome the express provisions of the statute. *Mertens*, 113 S. Ct. at 2071-72. In any event, trust principles, which assume fiduciary conduct, only beg the question of whether the conduct at issue here was undertaken in a fiduciary context at all.

[15] As to the ten individual plaintiffs who never worked for MCC, both the United States and plaintiffs concede as they must that "[n]o misrepresentations were made to the individual respondents in connection with the transfer to MCC of petitioner's obligation to pay benefits." (Pl. Br. 43; *see* U.S. Br. 18 n.16) Thus, there is *no* basis for affirming the decision below as to that group; they simply lost benefits to which they had no contractual right under the Eighth Circuit's own ruling. (PA 9a)

[16] Thus, the opposition's reliance (*e.g.* Pl. Br. 35-36; U.S. Br. 23 n.20, 27 n.24) upon *In re Unisys Corp. Retiree Medical Benefits "ERISA" Litigation*, 57 F.3d 1255, 1264 (3d Cir. 1995), where the court found that the company "had affirmatively and materially *misrepresented the terms of a plan* . . ." (emphasis added), is misplaced.

[17] Plaintiffs simply flee the scene of the 1984 CMMP Memo, which the district court found was disclosed to all employees and retirees

The opposition is thus forced to argue that the decision below should be affirmed on the basis alone of Varity's statements as to MCC's financial viability. And their struggle to force that square peg into the round hole of "plan administration" in order to make it fiduciary conduct is evident in the tests they conjure up to make it so.

Plaintiffs devote a single, thoroughly unpersuasive, paragraph to their attempt to demonstrate that misrepresentations as to the "financial health and outlook" of MCC were fiduciary conduct (Pl. Br. 37-38) Plaintiffs contend that these communications "directly related" to "the security of employee benefit rights" because in the case of a self-funded plan "the security of benefits is directly tied to the financial health of the employer/plan sponsor". (*Id.* at 38)[18] But that

in December 1983. (PA 74a ¶ 90) That document stated, in solid capital letters at the bottom of its schedule of benefits, that "THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES OF COVERED INDIVIDUALS AT ANY TIME." (JA 43).

Though conceding that Varity "may have had the right to terminate [plaintiffs'] welfare benefits" (U.S. Br. 26), the United States observes (U.S. Br. 2 n.1, 26 n.22) that the district court refused to give the 1984 reservation any effect, concluding that the reservation was "ambiguous" and that "a reasonable person . . . would not understand (from the 1984 CMMP Memo) that defendants were reserving a right to terminate welfare benefits in retirement." (PA 75a ¶ 93, 111a) The clarity of this reservation—not mentioned or disputed by the Eighth Circuit—is confirmed by the appellate court's ruling that similar language in the master plan document "*unambiguously* confers on the company the right to amend or terminate the Plan" and is "fatal" to any claim that benefits could not be terminated after retirement. (PA 9a) (emphasis added).

18 Even on its own terms, plaintiffs' theory is fanciful. That theory posits a misrepresentation that welfare benefits at MCC would be more "secure" than they turned out to be—continuous, unchanged benefits for 22 months before MCC went into receivership. But, in light of the Eighth Circuit's ruling that plaintiffs were never entitled to lifetime benefits and that under the plan's reservation of rights benefits could be terminated at any time (PA 9a), what "security" was ever promised but not delivered?

surely proves too much: the "security" of welfare benefits in a self-funded plan will always be affected by the financial health of the employer. The notion that because a plan is self-funded and thus tied in that sense to the employer's financial health cannot by itself mean that any alleged misrepresentation as to the financial future of MCC constituted the exercise of "plan administration". The statute provides no "self-funded" exception in its definition of fiduciary. Had Congress intended to provide employees with information concerning the prospects of a company whose "financial health" is directly tied to the "security of benefit rights", it surely would have affirmatively required such disclosure. It did not do so. Given ERISA's comprehensive regulation of employer and plan disclosure, such an omission is telling. *See Russell*, 473 U.S. at 146; *Mertens*, 113 S. Ct. at 2067, 2071.

Plaintiffs' argument effectively treats an employer's statements that welfare benefits in the future are expected to be "secure" as acts of "plan administration". Again, there is no statutory basis whatever for such a proposition and indeed every indication that ERISA does not regulate communications on the future "security" of welfare benefits but only information as to current benefits and procedures, changes in plan terms already made, and financial information as to the plan's preceding year. *See* ERISA §§ 101-104, 29 U.S.C. 1021-1024 (1988 & Supp. V 1993) (requirements for annual reports and plan summaries).

In fact, ERISA does not require that there be *any* "security" of welfare benefits. Congress clearly contemplated that the unpredictable costs of providing such benefits in the future and the changing economic realities of employers might lead (or force) companies to change or cut benefits. (*See* Pet. Br. 32-35) Employers are thus "generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare benefit plans", *Curtiss-Wright*, 115 S. Ct. at 1228.[19]

19 While it is by no means clear that employers must disclose a reservation of rights in order to amend or terminate welfare benefits, *e.g.*,

Plaintiffs' proposed definition of fiduciary conduct as involving any communication relating to anything potentially bearing on the security of welfare benefits in the future is about five leaps away from any reasonable interpretation of "plan administration." It is not only virtually limitless in its scope, but would rewrite ERISA so as to transform employees (and the federal courts) into auditors of the employer's business.[20] " 'ERISA does not require that "day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan participants." ' " *Adams*, 905 F.2d at 947 (citations omitted; collecting cases from other circuits). This principle, grounded in ERISA's language and structure and recently reaffirmed by this Court in *Curtiss-Wright*, 115 S. Ct. at 1228, makes clear that certain employer conduct—including much conduct that may indeed have the effect of harming beneficiaries—is simply not the realm of ERISA.

The very structure of ERISA confirms that Congress could not have intended any rule such as that offered by plaintiffs. Rendering actionable alleged misrepresentations about future business decisions that might affect the security of benefits necessarily shifts the focus of any inquiry away from "reliance on the face of written plan documents", *Curtiss-Wright*, 115 S. Ct. at 1230, to routine oral or informal written communications between employers and employees. Reliability and consistency, central to ERISA's goal of protecting

Wise v. *El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.), *cert. denied*, 114 S. Ct. 196 (1993), in this case that right *was* clearly and unambiguously disclosed by Varity. Thus, even under plaintiffs' broad view of plan administration as including communications about the "security" of benefits, plaintiffs always knew their welfare benefits were not secure and could be lost at any time.

20 Thus, for example, under plaintiffs' theory, an employer responding to employee inquiries about whether it intends to purchase a company, or downsize a division, would be required, in order to avoid liability under ERISA, to fully describe its plans to do so because such plans might affect the "security" of welfare benefits.

both employer and employee by requiring plan terms to be written, would be lost.

The United States takes what it advertises as a somewhat less rigid "contextual" approach, but its rule is fraught with the same flaws as that proposed by plaintiffs. The United States would impose fiduciary liability for (i) intentional misrepresentation of information, (ii) that may foreseeably affect a beneficiary's choices relating to a plan, (iii) when the employer has a financial interest in the outcome and (iv) "communicates in a context in which it would reasonably be viewed to be speaking in its capacity as a plan fiduciary". (U.S. Br. 19)[22] Again, no statutory basis is offered as to why communications as to *business* decisions that might affect *future* benefits as measured by the *employee's* perspective are part of "plan administration" and the United States actually offers several reasons why Varity's communications fall out-

22 Relying on *Martin* v. *OSRCH*, 499 U.S. 144, 151 (1991), and *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-30 (1988), the United States argues that the rule proposed by the Secretary of Labor is entitled to deference. (U.S. Br. 19 n.17) That is not so. This is not a case about differing agencies' conflicting interpretations of regulations, *Martin*, 499 U.S. at 151, or indeed, about the interpretation of regulations at all. *Gardebring*, 485 U.S. at 151, 156; *see Ford Motor Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980) (agency interpretations of their own regulations subject to deference). Rather, this is a case in which the Secretary—for the first time, in this Court—" 'ask[s] [this Court] to defer to his *new* statutory interpretation . . . formulated during litigation.' " *John Hancock Mutual Life Insurance Co.* v. *Harris Trust & Savings Bank*, 114 S. Ct. 517, 531 (1993) (quoting *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992)). Indeed, this is a case where the Secretary seeks to interpret a statutory provision, but has previously "articulated no position on the question". *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988); *accord Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) (no deference given to agency where it "cite[d] no administrative precedent" or prior "construction" to suggest that the agency "has in the past, so 'interpreted' " regulation). Moreover, the Court need not defer to an agency interpretation where it conflicts with the plain language at issue. *See John Hancock*, 114 S. Ct. at 531; *Gardebring*, 485 U.S. at 430.

side fiduciary conduct. The United States effectively concedes that this case is not about misrepresentations of plan terms (*see* U.S. Br. 26 n.23, 30), concedes that "a statement by a settlor of its intent" as to future benefits is non-fiduciary (U.S. Br. 28), and concedes that "generally" statements as to the benefit obligor's financial viability do not fall within the scope of "plan administration". (U.S. Br. 30) It nonetheless urges—even assuming a fully-disclosed reservation of rights (U.S. Br. 26)—that if an employee could view the totality of statements as "emanating" from the employer as a plan administrator, the employer should be held to be acting as a fiduciary.[23]

To be sure, the United States struggles mightily to propose a reasonable-sounding standard. But in its effort to concoct a test under which Varity's conduct is actionable, the United States limits liability not at all. It is difficult to imagine a situation involving *any* communication in any "context" as to future business decisions that might affect a participant's benefit choices that could not "reasonably" be viewed by employees as an act of a plan administrator, especially when employees directly ask about such intentions. How is an employer to know when its employees view it as acting as a plan administrator? What if, in the "context" of the communication, benefits are not explicitly mentioned at all, but an

[23] Thus, faced with no misrepresentations about current plan terms the United States is forced to argue that because Varity gave employees "written summaries of current benefits under the M-F and MCC Plans, and told the employees that their acceptances were required to ensure uninterrupted benefits"—*none* of which was false—during the same presentation in which Varity also stated that MCC was a financially viable entity, the latter statement, though not "generally" "within the scope of plan administration" was transformed into a fiduciary act because it was "intertwined" with communications respecting "current benefits". (U.S. Br. 30) But the United States has already conceded that representations about current benefits were *true*. The circuity and illogic of such reasoning well illustrates its ends-oriented goal.

employee nonetheless views benefits issues as central to any actions he or she takes?

Aside from having little if any basis in the statutory language, the United States' position, like plaintiffs' position, would undo all of ERISA's carefully balanced rules as to reliance by both employers and employees on written plan terms and limited disclosure of certain information at certain time periods, and the most basic difference between pension and welfare benefits: that employers may unilaterally terminate welfare benefits at any time outside of ERISA fiduciary standards.

Once the result-oriented tests offered by the opposition are discarded in favor of a straight-forward look at ERISA's language and structure, the result becomes plain: Varity's conduct about MCC's prospects may not be measured by § 404(a)(1) fiduciary standards as it was not undertaken in the course of plan administration. Particularly in the context of welfare benefits, "plan administration" can only mean to "manage" or "conduct", *Webster's Third New International Dictionary* 27-28, 1372, 474 (1961), the plan according to its current terms and according to all the specific ERISA provisions governing welfare benefit plans. The undisputed facts are that Varity never misrepresented the terms of the plan or promised that benefits would last for any particular length of time and that plaintiffs were advised in a written ERISA document through a reservation of rights that benefits *could* be terminated. All fiduciary duties were fulfilled.

CONCLUSION

The ruling of the court of appeals should be reversed to the extent it affirmed liability against Varity.

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No. 94-1471

In the Supreme Court of the United States

OCTOBER TERM, 1995

VARITY CORPORATION, PETITIONER

v.

CHARLES HOWE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether employee benefit plan participants and beneficiaries have a cause of action on their own behalf for equitable relief, under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3), to redress violations of the fiduciary responsibility provisions of the Act.

2. Whether Section 404(a)(1)(A) of ERISA, 29 U.S.C. 1104(a)(1)(A), imposes on a plan fiduciary who is also an employer a duty to the plan's participants and beneficiaries to avoid misrepresenting to them material information relating to the plan.

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INTEREST OF THE UNITED STATES

The Secretary of Labor is responsible for interpreting and enforcing the fiduciary obligation provisions in Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001-1169 (1988 & Supp. V 1993), and he is authorized to seek equitable relief under Section 502(a)(5) of ERISA, 29 U.S.C. 1132(a)(5), which mirrors the private enforcement provision at issue in this case.

STATEMENT

1. During the period relevant to this case, petitioner sold and distributed farm machinery and related parts through its wholly owned subsidiary, Massey-Ferguson, Inc. (M-F). Pet. App. 50a; see Pet. ii. In 1978, M-F established an unfunded, self-insured employee welfare benefit plan (Plan), through which it provided to its active and retired employees certain life insurance, health and major medical benefits. Pet. App. 3a, 66a. M-F was the admin-

istrator and the named fiduciary of the Plan. See 29 U.S.C. 1002(21)(A). Because it controlled M-F, petitioner was also a Plan fiduciary. Pet. App. 17a n.4, 78a-79a.

The provisions of the Plan were set forth in a formal legal document entitled "Massey-Ferguson, Inc. Employee Benefits Plan and Trust," Pet. App. 3a, which was not distributed to the employees, *id.* at 71a. The employees received a 200-page summary plan description captioned "You and Massey Ferguson" (*You & M-F*). *Id.* at 66a, 109a-112a; see 29 U.S.C. 1022, 1024 (1988 & Supp. V 1993). Although Section 7.4 of the formal Plan document reserved M-F's right, "by action of the Board, to amend or terminate the Plan or Trust at any time," Pet. App. 9a, *You & M-F* did not disclose that the Plan could be amended or terminated, *id.* at 72a. The district court found that respondents, as well as M-F's former president and other company officials, understood from language in *You & M-F* and from past company practice that benefits received upon retirement would continue for life. *Id.* at 70a-71a.[1]

In May 1986, petitioner transferred parts of several M-F divisions to a newly formed subsidiary, Massey Combines

[1] In December 1983, M-F distributed to its employees and retirees a memorandum describing a newly adopted "Comprehensive Major Medical Plan" (CMMP). Pet. App. 110a; see Pet. C.A. App. 545-569, 571-595. The memorandum contained, at the bottom of a schedule of benefits, a statement of M-F's right to "terminate, suspend, withdraw, amend or modify the plan," *id.* at 551, 577. Although the memorandum constituted a "Summary of Material Modifications" within the meaning of Section 102(a) of ERISA, 29 U.S.C. 1022(a), see Pet. App. 74a-75a, the district court found it deficient, because it was not written "in a manner calculated to be understood by the average plan participant," *id.* at 111a (quoting 29 C.F.R. 2520.102-2(a) (1988)). The court concluded that "a reasonable person * * * would not understand [from the memorandum] that defendants were reserving a right to terminate welfare benefits in retirement." Pet. App. 111a; see *id.* at 75a-76a.

Corporation (MCC). Pet. App. 2a, 53a, 57a-58a, 62a.[2] That corporate reorganization was effected to permit petitioner to avoid reporting in its consolidated financial statements significant losses that it was sustaining in the transferred businesses, *id.* at 86a-87a, and to "rid [petitioner] of substantial obligations for employee benefits due or to become due to workers" in those businesses, *id.* at 2a, 52a-54a. To the latter end, petitioner purported to transfer to MCC the responsibility for affording welfare benefits to approximately 4000 employees who had previously retired from M-F—without notifying the affected retirees. *Id.* at 3a, 51a-52a, 57a, 65a.

As part of the corporate reorganization, approximately 1500 active M-F employees were also moved to MCC. Although petitioner could have discharged those employees from M-F and then rehired any who wished to work at MCC, it instead sought the employees' consent to a transfer, hoping thereby to avoid claims for termination pay, and to shift to MCC the responsibility of providing retiree welfare benefits to those employees who were already eligible to retire or who would soon be retiring. Pet. App. 57a, 62a-63a. Petitioner explained the reorganization to the affected employees in a 30-minute meeting held at M-F's corporate headquarters in Des Moines, Iowa, and requested that each employee sign and submit his or her written acceptance by the close of the meeting. *Id.* at 63a. The presentation was designed to be "light, upbeat,

[2] Petitioner owned 45% of MCC's outstanding shares. The remaining shares were issued to the Canadian Imperial Bank of Commerce (35%) and the Canadian government (20%), in consideration for their forbearance on loans made to petitioner. Pet. App. 58a. Petitioner controlled the board of directors of MCC, *id.* at 83a, and the district court found that petitioner was MCC's alter ego, *id.* at 82a-83a. Petitioner did not dispute that finding on appeal. *Id.* at 10a n.3.

and positive," so as to "encourage [the employees] to sign the acceptance." *Ibid.*; see Resp. C.A. App. 65-66.

The employees were provided with a side-by-side comparison of benefits coverage, which indicated that MCC's benefits would be identical to those provided under the M-F Plan, J.A. 68-73, and were told that, when they transferred, "benefit programs w[ould] remain unchanged," J.A. 75, 80, 82.[3] Although petitioner stated that "[e]mployment conditions in the future will depend on our ability to make [MCC] a success," J.A. 76, it asserted that MCC had a "bright future" and that the "financial restructuring [that] created [MCC] . . . [would] provide the funds necessary to ensure its future viability," Pet. App. 3a; J.A. 80.[4] In fact, it was questionable whether MCC qualified as a going concern, Pet. App. 56a; on the day it was created, MCC's liabilities exceeded its assets by at least $46 million, and from the outset MCC's executives "openly discussed * * * that MCC could not survive," *ibid.*

In March 1988, MCC went into receivership in Canada and ceased providing welfare benefits. Pet. App. 52a.[5] The

[3] To avoid discouraging transfers, petitioner chose not to state that welfare benefits would "initially" remain unchanged, and not to disclose that the MCC Plan could be amended or terminated at any time. Pet. App. 4a-5a, 64a-65a.

[4] In addition, knowing that the employees' potential eligibility for termination pay and early retirement from M-F figured into their decisions whether to accept employment at MCC, Pet. App. 4a; J.A. 65, petitioner told the employees that "[t]echnically" they already worked for MCC, and that their written acceptances were necessary only "to ensure uninterrupted continuation of * * * pay and benefits," J.A. 76, 83; see J.A. 75.

[5] MCC had adopted the provisions of the M-F Plan for its own welfare benefits plan, Pet. App. 76a, and the MCC Plan was administered by M-F, *id.* at 61a. Petitioner was found to have been an MCC Plan fiduciary. *Id.* at 17a n.4, 78a-79a.

M-F retirees whose benefits obligations had been transferred to MCC first learned of that purported transfer when they stopped receiving their welfare benefits. *Id.* at 6a, 65a.

2. Respondents are (i) ten of the individuals who retired from M-F and were purportedly transferred as beneficiaries to the MCC Plan, and (ii) a class comprised of former M-F employees who transferred to MCC, retired from MCC, and lost their retiree welfare benefits when MCC failed (the Retired Class). Pet. App. 6a, 52a. Respondents filed suit against petitioner and M-F, stating claims under Section 502(a)(1)(B) of ERISA, 29 U.S.C. 1132(a)(1)(B), for retiree welfare benefits allegedly owed them under the Plan; equitable relief under Section 502(a)(3), 29 U.S.C. 1132(a)(3), for breach of fiduciary duties (in violation of Section 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A)) and interference with protected rights (in violation of Section 510, 29 U.S.C. 1140); estoppel; and common law fraudulent misrepresentation.

The district court found petitioner liable for breach of fiduciary duty, interference with protected rights, and equitable estoppel, and entered judgment for damages of $7.6 million for the Retired Class and $712,332 for the individual plaintiffs. Pet. App. 24a-25a, 46a-47a.[6] Noting that "a fiduciary owes strict duties running *directly to the*

[6] The district court held that respondents' claim for welfare benefits was precluded by the reservation of rights contained in the formal Plan document, Pet. App. 32a-36a, and that their fraudulent misrepresentation claim was preempted by ERISA, *id.* at 44a-45a. The court also rejected the claims brought on behalf of a class of employees who transferred to MCC and lost their jobs without termination pay when MCC failed (the Terminated Class), on the ground that M-F's severance policy created no contractual right to termination pay. *Id.* at 37a. Finally, the court struck the punitive damages award. See *id.* at 45a, 113a. The court of appeals affirmed those rulings, *id.* at 10a, and their merits are not before this Court.

trust beneficiaries," the court held that Section 502(a)(3) of ERISA provides plan participants and beneficiaries with a cause of action for individual relief for breach of fiduciary duty. Pet. App. 94a. The court found that petitioner breached its fiduciary duties to the Retired Class "[b]y making material misrepresentations and omissions * * * in connection with the prospective transfer of those plaintiffs' employment and benefit rights to MCC, including the misrepresentation of MCC's prospects for success and the failure to disclose its probable failure and the effect thereof on plaintiffs' benefits." *Id.* at 96a. The court found that petitioner breached its duties to the individual plaintiffs "[b]y attempting a facially invalid unilateral assignment of [their] benefit rights * * * from the M-F Plan to the MCC Plan." *Ibid.*

3. The court of appeals affirmed the district court's rulings respecting petitioner's liability for breach of its fiduciary duties,[7] but modified the relief awarded. Pet. App. 1a-21a. The court rejected petitioner's argument that, under *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134 (1985), participants and beneficiaries may not sue on their own behalf under Section 502(a)(3) for harm caused them by a breach of fiduciary duties. *Russell*, the court observed, established only that participants and beneficiaries may not raise individual claims under Section 502(a)(2) of the Act, which authorizes only plan-based relief. Noting that Section 502(a)(3) (which contains no similar limitation) broadly authorizes "appropriate equitable relief * * * to redress" statutory violations, the court held that a participant or beneficiary who suffers harm as a result of a fiduciary breach may sue under Section 502(a)(3) for individualized equitable relief. Pet. App. 14a-15a.

[7] The court did not address the judgment on respondents' claims of estoppel and interference with protected rights. Pet. App. 17a n.5.

The court also rejected petitioner's argument that its intentional misstatements were not actionable because they were made by petitioner in its capacity as employer, not as plan fiduciary.[8] The court acknowledged that petitioner's decision to effect the 1986 reorganization did not implicate its duty of loyalty, Pet. App. 12a-13a, but distinguished that sort of business decision from a misrepresentation of facts regarding plan administration, which constitutes a clear breach of fiduciary duties, *id.* at 13a.

Finally, the court vacated respondents' damage awards in light of *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063 (1993), which held that money damages are not "appropriate equitable relief" available under Section 502(a)(3). Pet. App. 18a. The court concluded, however, that respondents were entitled to restitution in an amount equal to the welfare benefits that petitioner would have paid them but for its fiduciary breach; that the Retired Class was entitled to an injunction reinstating its members to the M-F Plan as it existed at the time of their retirement from MCC; and that the individual plaintiffs were entitled to an injunction reinstating them to the M-F Plan as it existed at the time they were "transferred" to the MCC Plan. *Ibid.*[9]

[8] Petitioner did not contest the district court's findings of fact, Pet. App. 2a, and did not dispute that its misstatements constituted "a breach of fiduciary duty in the generic sense," *id.* at 12a (citing *Peoria Union Stock Yards Co. Retirement Plan* v. *Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries.")).

[9] Judge Hansen dissented on the issue of relief. Pet. App. 19a-21a. In his view, the court erred in fashioning an equitable remedy without the benefit of briefing and argument on that issue, and its award was more akin to consequential legal damages than to restitution. In our view, the award may properly be regarded as restitutionary because M-F, a self-insurer, was wrongfully enriched by the amount of benefits that it failed to pay respondents. See Restatement of Restitution § 1

SUMMARY OF ARGUMENT

I. Section 502(a)(3) of ERISA authorizes a plan participant or beneficiary to sue "to obtain * * * appropriate equitable relief * * * to redress * * * violations" of the Act's fiduciary responsibility provisions. One of those provisions, Section 404(a)(1), requires plan fiduciaries to "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries." When a breach of that duty inflicts distinct injuries on individual participants or beneficiaries, the breach is "appropriate[ly] * * * redress[ed]" through the provision of individualized equitable relief. Congress's provision in Sections 409(a) and 502(a)(2) of the Act of express, make-whole remedies for plans harmed by fiduciary breaches does not reflect a congressional determination to preclude individualized equitable relief under Section 502(a)(3) when participants or beneficiaries suffer distinct harms from fiduciary misconduct.

II. Congress looked to the law of trusts for delineation of the substance and scope of the fiduciary duties it imposed on plan fiduciaries. At common law, the duty of loyalty incorporated a duty of candor, which required a trustee who dealt with a beneficiary to do so in the utmost good faith, to provide the beneficiary with complete and correct information relating to the transaction, and to forbear from making material misstatements relating to the beneficiary's interests. A breach of candor rendered the transaction voidable by the beneficiary. The same concerns for abuse and overreaching that informed the duty of candor at common law apply to dealings between ERISA fiduciaries and plan participants and beneficiaries.

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cmt. b, at 12 (1937). In any event, petitioner has not challenged the equitable nature of the relief ordered by the court of appeals.

An employer who also serves as a plan fiduciary is a fiduciary "to the extent" that the employer acts within the scope of its fiduciary authority or responsibilities. 29 U.S.C. 1002(1). When such an employer makes a misstatement that foreseeably affects a participant's or beneficiary's choices under a plan or otherwise respecting plan benefits, the communication should be viewed in context to determine whether a reasonable participant would have understood the employer to be communicating in its capacity as a plan fiduciary. And when, as in this case, the employer conflates its roles by addressing in a single communication matters of plan administration and nonplan matters that have a direct bearing on plan benefits, the employer runs (and should bear) the risk that it will be understood to have spoken throughout as a fiduciary.

ARGUMENT

I. SECTION 502(a)(3) OF ERISA AUTHORIZES PLAN PARTICIPANTS AND BENEFICIARIES TO OBTAIN RELIEF ON THEIR OWN BEHALF FOR BREACHES OF THE FIDUCIARY DUTIES CODIFIED IN SECTION 404(a)(1)

Section 502(a)(3) of ERISA authorizes suit "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. 1132(a)(3). Petitioner argues (Pet. Br. 16-29) that, notwithstanding its unqualified text, Section 502(a)(3) should not be read to authorize individualized relief for violations of the Act's fiduciary responsibility provisions. That argument is without merit.

1. Section 502(a)(3) authorizes "a participant [or] beneficiary" to obtain appropriate equitable relief to redress

"*any* act or practice which violates *any* provision of this subchapter." 29 U.S.C. 1132(a)(3) (emphasis added). The referenced "subchapter" is Subchapter I of Chapter 18 of Title 29 (29 U.S.C. 1001-1169 (1988 & Supp. V 1993)), which includes ERISA's fiduciary responsibility provisions, 29 U.S.C. 1101-1112 (1988 & Supp. V 1993). A violation of any of those provisions is therefore an "act or practice" for which Section 502(a)(3) provides relief. See *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063, 2068 n.5 (1993).

Section 404(a)(1)(A) of ERISA, 29 U.S.C. 1104(a)(1)(A), states that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * for the exclusive purpose of * * * providing benefits to participants and their beneficiaries." This Court has recognized that Congress intended through that provision to codify the strict duty of loyalty that traditionally applied to trustees in their conduct towards trust beneficiaries. *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570-571 (1985); see also S. Rep. No. 127, 93d Cong., 1st Sess. 29 (1973); H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973). The text of the provision makes clear that under ERISA, as at common law,[10] a fiduciary's duty of loyalty runs directly to individual participants and beneficiaries. See *Massachusetts Mut. Life*

[10] Under the law of trusts, a trustee's duty of loyalty ran directly to the beneficiary. See Restatement (Second) of Trusts § 170(1), at 364 (1959) ("The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."); accord G. Bogert & G. Bogert, *The Law of Trusts & Trustees* § 543, at 218 (2d ed. rev. 1993); 2A W.F. Fratcher, *The Law of Trusts* § 170, at 311 (4th ed. 1987); see also *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 152-153 (1985) (Brennan, J., concurring in the judgment) ("[I]t is black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits.").

Ins. Co. v. *Russell*, 473 U.S. 134, 142 (1985) ("It is of course true that the fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries.").[11] When a breach of that duty causes distinct harm to individual participants or beneficiaries, the breach is "appropriate[ly]" subject, under Section 502(a)(3), to suit by the injured individuals for equitable relief.

2. Recognition of a cause of action to redress individual harms caused by fiduciary misconduct is consistent with Congress's purpose, set forth in the text of ERISA, "to protect * * * the interests of participants in employee benefit plans and their beneficiaries * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). In explaining the need to codify fiduciary standards in federal law, the committee reports stressed that "without standards by which a participant can measure the fiduciary's conduct * * * he is not equipped to safeguard either *his own rights* or the plan assets." S. Rep. No. 127, *supra*, at 29 (emphasis added); see also *id.* at 27 ("[T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that *individual participants and beneficiaries will be armed with enough information*

[11] It is notable, in that regard, that Section 404(a) refers to a fiduciary's duties "with respect to a plan," a phrase that is most naturally read to extend the requirement of loyalty to all of a fiduciary's plan-related functions. See *Webster's Third New International Dictionary* 1934 (1986) (equating "respect to" with "regard or reference to" and "concerned with"); cf. *Smith* v. *United States*, 113 S. Ct. 2050, 2058-2059 (1993). If Congress had intended through that provision to restrict a fiduciary's duty of loyalty "to the plan" itself, Congress presumably would have used narrower language to that effect.

to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.") (emphasis added); accord H.R. Rep. No. 533, *supra*, at 11, 12.

3. Petitioner concedes (Pet. Br. 23) that Section 404 of the Act imposes on fiduciaries a duty of loyalty to participants and beneficiaries. Accord Chamber of Commerce Amicus Br. (Chamber Br.) 17-18 (acknowledging that misrepresentation to individual employee about benefit coverage violates fiduciary duty under ERISA). Petitioner's amici further concede, and petitioner does not dispute, that "the language of section 502(a)(3) might literally be read" to authorize individualized equitable relief for a violation of that duty. Chamber Br. 9; Eastman Kodak Co. et al. Amici Br. (Kodak Br.) 7. Petitioner contends (Pet. Br. 17-29), however, that recognition of an individualized cause of action for breach of fiduciary duties under Section 502(a)(3) would be inconsistent with Congress's provision of plan-based remedies for fiduciary breaches in Sections 409(a) and 502(a)(2). Petitioner misapprehends the statutory scheme.

Section 502(a)(2) authorizes an action "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [Section 409 of the Act]." 29 U.S.C. 1132(a)(2). Section 409(a) (entitled "Liability for breach of fiduciary duty") provides in turn that a fiduciary with respect to a plan who breaches the fiduciary duties imposed by the Act

> shall be personally liable *to make good to such plan* any losses to the plan resulting from each such breach, and *to restore to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

29 U.S.C. 1109(a) (emphasis added). In *Russell*, the Court, relying largely on Section 409(a)'s express limitation of its remedies "to the plan," concluded that Section 409(a)'s reference to "other equitable or remedial relief" authorizes only "plan-related" relief, and does not authorize relief to an individual beneficiary. 473 U.S. at 140-142.[12]

Contrary to petitioner's contention (Pet. Br. 17), *Russell* does not "compel[]" the restrictive reading of Section 502(a)(3) that petitioner urges. Because the beneficiary in *Russell* sued exclusively under Sections 409(a) and 502(a)(2), and disclaimed reliance on Section 502(a)(3), this Court left open the question whether "any other provision of ERISA" might provide the relief requested. See 473 U.S. at 139 n.5; *id.* at 150 (Brennan, J., concurring in the judgment). Moreover, the holding in *Russell* was based principally on the text of Section 409(a), which is incorporated by reference in Section 502(a)(2). That text stands in marked contrast to Section 502(a)(3), which contains no comparable language indicating that relief is confined to the plan itself. See *Russell*, 473 U.S. at 150 (Brennan, J., concurring in the judgment).

Citing the maxim that "the specific governs over the general," petitioner argues (Pet. Br. 21-22) that Congress's specific provision for plan-based relief in Sections 409(a) and 502(a)(2) precludes by implication the availability of individualized relief for fiduciary breaches under Section 502(a)(3). That maxim does not assist petitioner. Section 409(a) "specific[ally] governs" only the subject of relief to the plan. It does not govern the distinct subject of appropriate relief for individual participants or beneficiaries, which *does* fall within the language of Section 502(a)(3).

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[12] In *Russell*, a beneficiary sued a plan fiduciary for bad-faith processing of her claim for benefits, asserting a right under Sections 409(a) and 502(a)(2) to recover compensatory and punitive damages.

A specific provision should be understood to limit the reach of a general one if applying the text of both provisions creates a conflict or other dissonance in the statutory scheme. Here, however, there is no incongruity in providing both make-whole relief to plans under Sections 409(a) and 502(a)(2), and individualized equitable relief to participants and beneficiaries who suffer distinct harms under Section 502(a)(3). This is not a circumstance in which application of a general rule produces a result that conflicts with the mandate of a more specific rule. See, *e.g.*, *Bulova Watch Co.* v. *United States*, 365 U.S. 753 (1961); *Fourco Glass Co.* v. *Transmirra Prod. Corp.*, 353 U.S. 222 (1957). Notwithstanding petitioner's contrary view (Pet. Br. 21), although Sections 409(a) and 502(a)(2) do not themselves affirmatively authorize individualized relief for fiduciary misconduct, neither do those provisions affirmatively foreclose such relief under other provisions of the Act.

Nor is this a circumstance in which giving full scope to a general rule would render an assertedly more specific rule superfluous. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Clifford F. MacEvoy Co.* v. *United States*, 322 U.S. 102, 106-107 (1944). Under our interpretation, each of the pertinent enforcement provisions retains discrete functions for remedying fiduciary breaches: Section 502(a)(2) authorizes monetary recovery to compensate for a plan's losses (as well as equitable relief on behalf of the plan itself), whereas Section 502(a)(3) authorizes more limited relief—equitable only—running to individual participants or beneficiaries.

Finally, application of Section 502(a)(3) according to its express terms would not disrupt a comprehensive scheme that governs a discrete subset of cases. See, *e.g.*, *HCSC-Laundry* v. *United States*, 450 U.S. 1, 6 (1981); cf. *Russell*, 473 U.S. at 143-144. To be sure, in drafting the Act's fiduciary provisions, Congress codified many specific rules

regulating the administration of plans as entities, the investment of plan assets, and dealings between fiduciaries and plans. See, *e.g.*, 29 U.S.C. 1102, 1104(a)(1)(C), 1106(b), 1107, 1133 (1988 & Supp. V 1993). Congress's specific attention to those matters is understandable: Misuse of plan assets and investments directly harms a plan, and thereby puts at risk the collective interests of its participants and beneficiaries. In addition, however, Congress also codified a strict duty of loyalty, and fiduciaries' violations of that duty will in some instances inflict distinct injuries on participants or beneficiaries without affecting the plan as a whole. See *Bixler* v. *Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1298 (3d Cir. 1993). In instances of affirmative misrepresentation to plan participants, as in this case, the harm caused by the fiduciary's breach is particularly likely to be individualized. See, *e.g.*, *Mullins* v. *Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994) (misrepresentation by employer of its intentions regarding future changes in plan's early retirement benefits); *Anweiler* v. *American Elec. Power Serv. Corp.*, 3 F.3d 986 (7th Cir. 1993) (same); see also Kodak Br. 23 (citing examples); Chamber Br. 17-18 (same).[13]

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[13] A breach of fiduciary duties may cause distinct harm to individuals in other contexts as well. For example, where a sponsor gives the trustees of a multiemployer pension plan discretionary power to set eligibility levels, most courts have held the trustees to ERISA fiduciary standards in their exercise of that power. See, *e.g.*, *Mahoney* v. *Board of Trustees*, 973 F.2d 968, 970-973 (1st Cir. 1992) (Breyer, C.J.); *Elser* v. *I.A.M. Nat'l Pension Fund*, 684 F.2d 648, 652-653 (9th Cir. 1982), cert. denied, 464 U.S. 813 (1983); but see *Pope* v. *Central States Southeast & Southwest Areas Health & Welfare Fund*, 27 F.3d 211, 213 (6th Cir. 1994). When the trustees act arbitrarily and capriciously in setting benefit rules that disfavor a particular class of participants, the courts have generally permitted the disadvantaged class to assert a claim of fiduciary breach against the trustees and seek reformation of

The provision of broad, make-whole remedies in Section 409(a) indicates that its drafters "were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Russell*, 473 U.S. at 142. That understanding of Section 409(a) (and therefore of Section 502(a)(2)), however, does not commend (much less compel) a restrictive reading of Section 502(a)(3) that fails to afford participants and beneficiaries the limited equitable relief that is available to them under the quite different text of that Section. *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 371 (1986). To the contrary, because Section 409(a) provides redress only for injuries to the plan, a failure to permit suit under Section 502(a)(3) to redress individualized harms resulting from breaches of the duty of loyalty owed directly to participants and beneficiaries would create an anomalous gap in an otherwise comprehensive enforcement scheme.[14]

Contrary to petitioner's assertion, Pet. 12, affording individuals relief for fiduciary breaches under Section 502(a)(3) does not transgress the principle that "where a

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the plan. *Elser*, 684 F.2d at 652, 658; *Deak* v. *Masters, Mates & Pilots Pension Plan*, 821 F.2d 572, 581 (11th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); *Chambless* v. *Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1038-1039 (2d Cir. 1985), cert. denied, 475 U.S. 1012 (1986).

[14] ERISA's legislative history does not point to a contrary reading. Petitioner notes that the "other appropriate equitable relief" provision in Section 502(a)(3) appeared in the bill well after the provisions for plan-based relief for breach of fiduciary duties were first introduced. Petitioner infers from that sequence that Section 502(a)(3) was not intended to afford redress for fiduciary violations. Pet. Br. 26-27. The drafting sequence is, however, equally susceptible to an inference that the lack of any cause of action for redress of individual harms from fiduciary breaches was one of the statutory gaps that the general provision for equitable relief under Section 502(a)(3) was meant to fill.

statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Russell*, 473 U.S. at 147. The Court invoked that principle in *Russell* in response to the respondent's suggestion that the Court recognize an implied private right of action for extra-contractual damages, *id.* at 145-148; and it noted that principle in *Mertens*, when discussing whether the absence of an express duty on the part of nonfiduciaries to avoid participation in fiduciary breaches militated against recognition of such a duty by implication, 113 S. Ct. at 2067. That principle has no application in this case, because Section 502(a)(3) *expressly* authorizes a cause of action for equitable relief for violations of the Act, and Section 404(a)(1)(A) *expressly* imposes on fiduciaries a duty of loyalty to participants and beneficiaries.[15]

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[15] The Pension Annuitants Protection Act of 1994 (PAPA), Pub. L. No. 103-401, § 2, 108 Stat. 4172, amended Section 502 by adding a new subsection (a)(9), which grants annuitants standing to bring suit and obtain relief (including money damages) for breaches of fiduciary duty in connection with fiduciaries' purchase of termination annuities. Congress passed PAPA in the wake of the collapse of the Executive Life Insurance Company of California, in response to decisions by some courts that employees and retirees whose plans had been terminated and replaced with Executive Life annuities "[were] not plan participants and therefore lack[ed] standing under ERISA to challenge the decision of the plan fiduciary to dispose of plan assets by purchasing [those] annuities." H.R. Rep. No. 872, 103d Cong., 2d Sess. 43 (1994); see, *e.g.*, *Kayes* v. *Pacific Lumber Co.*, Nos. C-89-3500 SBA & C-91-1812 SBA, 1993 U.S. Dist. LEXIS 7280 (N.D. Cal. May 17, 1993), aff'd in part, rev'd in part, and remanded, 51 F.3d 1449 (9th Cir. 1995). The legislation was also prompted by a concern that Section 502(a)(3) would not be interpreted to authorize monetary relief for annuitants affected by those sorts of breaches. H.R. Rep. No. 872, *supra*, at 41-43. PAPA does not affect the proper resolution of the question in this case. See PAPA § 4, 108 Stat. 4172 ("Nothing in this Act shall be construed to limit the legal standing of individuals to bring a civil action as participants or beneficiaries under section 502(a) of [ERISA].").

4. Finally, petitioner falls back on the proposition (Pet. Br. 17-18) that the "tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs" requires a balancing of interests, *Mertens*, 113 S. Ct. at 2072, and objects that suits for individualized equitable relief for fiduciary breaches may increase overall plan costs. It was Congress, however, that imposed on fiduciaries a substantive duty of loyalty to plan participants and beneficiaries, and provided a cause of action for equitable relief to redress violations of that and other provisions of the Act. Giving effect to the text of Section 502(a)(3) that authorizes equitable (but not compensatory) relief in these circumstances implements the balance of interests struck by Congress.

II. SECTION 404(a)(1)(A) OF ERISA IMPOSES ON AN EMPLOYER, IN THOSE CONTEXTS IN WHICH IT ACTS AS A PLAN FIDUCIARY, A DUTY NOT TO MISREPRESENT TO PARTICIPANTS AND BENEFICIARIES MATERIAL INFORMATION RELATING TO A PLAN[16]

When Congress codified in Section 404(a)(1)(A) of ERISA a fiduciary duty of loyalty to plan participants and beneficiaries, it did not attempt to specify all of the requirements and limitations that follow from it. Instead, Congress "invoked the common law of trusts to define the general scope of [the duty]." *Central States*, 472 U.S. at 570; accord *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989). By reference to principles well established at common law, and consistent with the text and overall structure of ERISA, the Secretary of Labor interprets Section 404(a)(1)(A) to forbid an employer who also serves as a plan fiduciary from intentionally misrepresenting to participants or beneficiaries information that may foreseeably affect their choices under or relating to a plan, when that employer has a financial interest in the outcome and communicates in a context in which it would reasonably be viewed to be speaking in its capacity as a plan fiduciary. The Secretary's interpretation is reasonable and entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[17]

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[16] The Court's resolution of this issue should not affect the judgment obtained by the individual plaintiffs. Although the court of appeals held that the individual plaintiffs were entitled to relief under Section 502(a)(3) for "a clear breach of fiduciary duty in violation of" Section 404(a)(1), Pet. App. 17a, the harm to those plaintiffs does not appear to have resulted from any miscommunications by petitioner. Rather, when petitioner disavowed its obligation to provide the individual plaintiffs' welfare benefits, it breached its obligation under Section 404(a)(1)(D), 29 U.S.C. 1104(a)(1)(D) (Supp. V 1993), to "discharge [its] duties * * * in accordance with the documents and instruments governing the plan," because petitioner had no right under the M-F Plan unilaterally to transfer individual employees to another benefit plan. Pet. App. 76a, 96a.

[17] Petitioner's amici argue, based on *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988), that when the Secretary's interpretation is offered for the first time in an amicus brief, it merits no deference. Kodak Br. 12 n.4. *Georgetown* does not support that proposition. In *Georgetown*, counsel offered a new interpretation of the regulation at issue in the course of litigation to which the agency was a party, and the interpretation that counsel offered was at odds both with the agency's characterization of the regulation at the time of its promulgation, and with the agency's prior interpretation of the underlying statute. In refusing to accord counsel's interpretation deference, this Court acted in a manner consistent with its longstanding refusal to defer to "'litigating positions' * * * when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court." *Martin* v. *OSHRC*, 499 U.S. 144, 156 (1991). When, as in this case, an agency offers its view as amicus curiae, both its determination to participate in the case and its legal position may properly be viewed as considered decisions of the agency, not "*post hoc* rationalizations" or mere "litigating

1. At common law, the courts recognized that "[i]f the beneficiary [was] to be able to hold the trustee to proper standards of care and honesty * * *, he must know of what the trust property consists and how it is being managed." G. Bogert & G. Bogert, *The Law of Trusts & Trustees* § 961, at 2-3 (2d ed. rev. 1993). Accordingly, a trustee had a "duty to inform the beneficiary of important matters concerning the trust and * * * the beneficiary [was] entitled to demand of the trustee all information about the trust and its execution for which he ha[d] any reasonable use." *Id.* at 3; see 2A W.F. Fratcher, *The Law of Trusts* § 173, at 462-464 (4th ed. 1987). ERISA's detailed reporting and disclosure provisions, see 29 U.S.C. 1021-1031 (1988 & Supp. V 1993), correlate with, and in some respects expand upon, those common law obligations.

The common law trustee took on additional disclosure obligations when he dealt (in his personal capacity) with a trust beneficiary, for example, in connection with a sale by a beneficiary to the trustee of the former's interest in the trust. Because "[t]he trustee may have information about the trust property known to no one else," and "[t]he beneficiary will naturally rely on the fairness and frankness of the trustee in effecting such a sale," transactions between trustee and beneficiary presented "great opportunity for the exercise of fraud and undue influence." Bogert, *supra*, § 544, at 456. Thus, when a trustee dealt with a beneficiary, he was required to exercise "utmost

positions." This Court has previously accorded deference to an agency's view of its regulations first stated in an amicus brief. See *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988). Similar considerations militate in favor of deference here to the Secretary's interpretation of the scope of an employer-fiduciary's duty of loyalty, particularly because the Act provides little express guidance on the matter, and its resolution requires a careful balancing of statutory objectives. See *Chevron*, 467 U.S. at 843-845.

candor and fair play," G. Bogert, *Trusts* § 96, at 348 (6th ed. 1987) (*Trusts*), and to inform the beneficiary of "all the facts which would naturally influence the beneficiary to accept or reject the proposal," *id.* at 350. See also Restatement (Second) of Trusts, *supra*, § 173 cmt. d, at 378. Such transactions were voidable by the beneficiary, unless the trustee could establish, among other things, that he acted in good faith, made "a full disclosure[,] and did not induce the sale by taking advantage of his relation to the beneficiar[y] or by other improper conduct." Fratcher, *supra*, § 170.1, at 317; see Bogert, *supra*, § 544, at 457. Actual misrepresentation by the trustee automatically rendered the transaction voidable or subject to the remedy of a constructive trust. *Id.* at 462 n.13.

2. The reasons for applying a heightened duty of candor in connection with trustees' dealings with beneficiaries apply with equal force to fiduciaries' dealings with participants and beneficiaries under ERISA. Just as a trust beneficiary relies on the trustee for correct and complete information respecting the trust, a participant relies on the plan's fiduciaries for complete and accurate information respecting the plan. See S. Rep. No. 127, *supra*, at 28 ("A fiduciary is one who occupies a position of confidence or trust."); H.R. Rep. No. 533, *supra*, at 11 (same).

Petitioner correctly recognizes (Br. 36-40) that any analysis of affirmative disclosure obligations arising from the duty of loyalty should take into account Congress's codification in ERISA of "a comprehensive set of 'reporting and disclosure' requirements." *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1230 (1995).[18] This case,

[18] We do not agree with petitioner's view that the existence under ERISA of specific reporting and disclosure requirements precludes recognition of any affirmative disclosure obligations arising from the duty of loyalty. See *Acosta* v. *Pacific Enters.*, 950 F.2d 611, 618 (9th

however, does not call for such an analysis, because the courts below found that petitioner engaged in affirmative deceit.[19] The district court found, specifically, that petitioner made "representations * * * regarding the potential financial viability of MCC, MCC's business outlook, and the employee benefits [that] were materially misleading"; that "[petitioner] knew the representations were materially misleading when they were made"; and that "[respondents] relied on these representations to their

Cir. 1991); *Eddy* v. *Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990) ("A fiduciary's duty * * * is not discharged simply by the issuance and dissemination of these [mandatory] documents and notices."). The disclosure and reporting requirements under ERISA are rough counterparts to trustees' common law obligations to provide beneficiaries with an accounting and with basic information respecting the administration of the trust. See p. 20, *supra*. Those requirements do not, however, purport to address the special concerns that arise when a fiduciary deals with a participant or beneficiary. They therefore do not preclude by implication an interpretation of Section 404(a)(1), consistent with its common law antecedents, that imposes a duty of candor in that situation. It is noteworthy, in that respect, that the trustee's general duty to furnish information co-existed at common law with the heightened duty of candor.

[19] The question whether the duty of loyalty itself imposes an affirmative duty to disclose material information has arisen in a variety of contexts. For example, although the courts have affirmed that fiduciaries have a loyalty-based duty, in response to a particularized inquiry, to provide "complete and correct material information on [the participant's] status and options," *Eddy*, 919 F.2d at 750; *Bixler*, 12 F.3d at 1298, they have been generally resistant to requiring, under the duty of loyalty, more prompt notice of plan changes than is expressly required by 29 U.S.C. 1024(b)(1) (1988 & Supp. V 1993), see, *e.g.*, *Porto* v. *Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987), cert. denied, 485 U.S. 937 (1988). The differing textual, common law, and policy concerns that come into play in various contexts counsel against an attempt to fashion a unitary answer, particularly in a case involving affirmative misstatements.

detriment." Pet. App. 65a. To the extent that the court dealt with omissions, the ones it cited—concerning petitioner's knowledge of MCC's poor financial condition and dismal prospects, MCC's right to modify or terminate its welfare plan, and the likelihood that welfare benefits paid by MCC would be reduced or discontinued—were inextricably tied to affirmative misrepresentations that it made on the same subjects.[20]

The duty of loyalty under ERISA incorporates the common law prohibition of intentional misrepresentation. See *Peoria Union Stock Yards Co. Retirement Plan* v. *Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA."); *Fischer* v. *Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir.) ("Put simply, when a plan administrator speaks, it must speak truthfully."), cert. denied, 114 S. Ct. 622 (1993). Moreover, just as the common law duty of candor extended to those "facts which would naturally influence the beneficiary to accept or reject [a trustee's proposal to acquire the beneficiary's interest in the trust]," *Trusts*, *supra*, § 96, at 350, the duty of loyalty under Section 404(a)(1)(A) proscribes the intentional misstatement of "facts which would naturally influence" a choice that a fiduciary with a financial interest in the outcome asks an employee to make under or with respect to a benefit plan. Indeed, the courts of appeals that have considered the

[20] Cf. *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, No. 94-1875, 1995 WL 380983, at *6 (3d Cir. June 28, 1995) ("[T]his is not a case involving an employer's 'duty to remind.' Instead, this case is more accurately characterized as a dispute over an employer's duty, as an ERISA fiduciary, not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures.").

matter uniformly have held that material misrepresentations are inconsistent with a fiduciary's duty of loyalty under the Act. See *Mullins*, 23 F.3d at 669; *Unisys Corp.*, No. 94-1875, 1995 WL 380983, at *4-*5; *Eddy*, 919 F.2d at 750-751; *Berlin* v. *Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163-1164 (6th Cir. 1988); *Local Union 2134* v. *Powhatan Fuel, Inc.*, 828 F.2d 710, 713 (11th Cir. 1987).[21]

3. A misstatement can constitute a fiduciary breach, of course, only if made by a fiduciary. ERISA expressly permits an employer to serve as a fiduciary of its benefits plans. 29 U.S.C. 1002(14)(C), 1108(c)(3). The Act reconciles the conflicting interests inherent in that arrangement by considering the employer to be a fiduciary only

> *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee * * * with respect to any moneys or other property of such plan, or * * * (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. 1002(21)(A) (emphasis added). When an employer that serves as a plan fiduciary is not acting in its fiduciary capacity, it is not subject to the Act's fiduciary constraints. See, *e.g.*, *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155,

[21] As noted, p. 21, *supra*, at common law, an intentional misstatement by a trustee in the context of a transaction between the trustee and the beneficiary rendered the transaction voidable by the beneficiary. In this case, the judgment mirrored that result. The court of appeals effectively voided the Retired Class members' consents to transfer to the MCC Plan by requiring petitioner to pay them the benefits they would have been paid had they retired under the M-F Plan, and to reinstate them into the M-F Plan. Pet. App. 18a-19a.

1161 (3d Cir. 1990); *Berlin*, 858 F.2d at 1162-1163; *Powhatan Fuel*, 828 F.2d at 713-714. For instance, an employer may act in its own self-interest (*i.e.*, not "solely in the interest of the participants and beneficiaries") when it decides whether to adopt, modify, or terminate a welfare plan, because it makes those decisions as sponsor, not fiduciary. *Curtiss-Wright*, 115 S. Ct. at 1228. The court of appeals thus correctly observed (Pet. App. 12a-13a) that "not every business decision made by a fiduciary will subject it to liability for breach of fiduciary duty, even though the decision may detrimentally affect the prosperity of the company, the assets of the plan, or the interests of plan beneficiaries."

In determining whether an employer's representations are subject to fiduciary standards, the relevant inquiry is whether the representations were made within the scope of the employer's exercise of "discretionary authority or discretionary responsibility in the administration of [the] plan." 29 U.S.C. 1002(21)(A)(iii). Petitioner agrees with that formulation. Pet. Br. 31-32. In some circumstances, however, it might be difficult to determine whether an employer is engaged in plan administration, because the employer may communicate regarding a matter, and/or in a context, that implicates both its interests as employer and its role as plan fiduciary. In petitioner's view, this case raises none of those difficulties because, irrespective of context, the misstatements at issue in this case cannot, they contend, be actionable as breaches of fiduciary duty. We disagree.

Petitioner argues (Pet. Br. 30-36) that it had the right, under ERISA, to terminate or amend its welfare benefit plans at any time, that it disclosed that right to the plans' participants and beneficiaries, and that it therefore may not be held liable under ERISA for misstatements relating to the likelihood of future benefits. Contrary to petitioner's

assertion, however, the district court found that petitioner did not fulfill its obligation to disclose its right to amend or terminate its welfare benefit plans.[22] But even if it had, the right to eliminate benefits by formally terminating or amending a plan through the prescribed procedures (see *Curtiss-Wright*, 115 S. Ct. at 1228-1229) does not license the sponsor to deprive participants or beneficiaries of those benefits through unlawful means. Petitioner may have had the right to terminate respondents' welfare benefits by amending the M-F Plan, but it did not have the right to dupe them into giving up those benefits.[23]

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[22] The district court acknowledged that petitioner reserved the right to amend or terminate benefits under Section 7.4 of the formal Plan document, Pet. App. 66a, but found that it failed to disclose its right to terminate retirees' benefits in its summary plan description (*You & M-F*), *id.* at 66a-67a, 72a, and did not disclose that right adequately in its 1983 summary of material modifications, *id.* at 75a-76a, 111a. Section 102(b) of ERISA, 29 U.S.C. 1022(b), and 29 C.F.R. 2520.102-3 require that a summary plan description include information concerning "the circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." Because plan termination may result in the denial or loss of benefits, a summary plan description must include "a summary of any plan provisions governing the rights of the plan sponsor or others to terminate the plan, and the circumstances, if any, under which the plan may be terminated." Office of Pension and Welfare Benefit Programs, U.S. Dep't of Labor, ERISA Tech. Release No. 84-1 (May 4, 1984).

[23] Although the district court found that petitioner misled its employees concerning its intentions to modify the MCC Plan, Pet. App. 64a, the MCC Plan was not in fact modified or voluntarily terminated. Whatever intentions petitioner might have had with respect to such modifications, it ceased providing benefits because MCC went into receivership. Petitioner's statement that "benefit programs w[ould] remain unchanged" (J.A. 75, 80, 82), which the courts below found misleading, was therefore relevant to the award in this case (if at all) only to the extent that it was understood, in context, to reflect

Petitioner also contends (Pet. Br. 37-39) that an employer's statements to plan participants concerning its intentions with regard to future benefits, and any financial projections it makes, can never be subject to fiduciary constraints, because the employer is not, as a fiduciary, affirmatively required to disclose that sort of information. According to petitioner's logic, an employer-fiduciary does not violate its duty of loyalty when it intentionally lies to participants or beneficiaries in an effort to defraud them out of plan benefits so long as the lie does not involve information that a fiduciary is specifically required to provide under the Act's disclosure or reporting provisions. Communications that are not affirmatively required of a fiduciary, however, may nonetheless be within its discretionary authority to administer the plan.[24]

Although the express requirements of the Act provide the basic structure for plan administration, actual plan administration entails countless related tasks. Thus, for example, while the Act requires an administrator to prepare and distribute to all participants and beneficiaries plan descriptions, summary plan descriptions, summaries of material modifications, and annual reports, 29 U.S.C. 1021-1024 (1988 & Supp. V 1993), and to furnish on request statements summarizing an individual's accrued benefits, 29 U.S.C. 1025 (1988 & Supp. V 1993), an administrator may supplement those materials with additional information

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petitioner's expectation that MCC "would remain" solvent, and thereby retain the ability to afford the current level of benefits.

[24] Cf. *Unisys Corp.*, No 94-1875, 1995 WL 380983, at *6 ("[S]atisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed plan participants to communicate candidly if the plan administrator simultaneously or subsequently makes material misrepresentations to those whom the duty of loyalty and prudence are owed.").

relating to the plan, and may (and generally will) respond to specific employee concerns through additional writings, meetings, or conversations with individual employees. To the extent that the employer intentionally misleads participants or beneficiaries in the context of such communications, its misrepresentations partake of overreaching and abuse of trust, and the employer is correctly found to have breached its duties as a plan fiduciary. See *Berlin*, 858 F.2d at 1163; *Powhatan Fuel*, 828 F.2d at 714.[25]

The subject matter of a representation will naturally bear on the determination whether it should be treated as having been made by the employer in a fiduciary capacity. A statement purporting to describe current benefits, for example, will almost invariably be viewed as emanating from the employer in its capacity as plan administrator, because describing current benefits falls within the scope of a plan administrator's express statutory duties. A statement regarding future benefits could be viewed either way—as a statement by a settlor of its intent (non-fiduciary), or as a statement by an administrator as to the likelihood that current benefits will continue (fiduciary).[26] A statement relating to the employer's financial condition

[25] Petitioner's amici concede that informal discussions and/or interpretations respecting plan benefits fall within the scope of plan administration, see Kodak Br. 23, and that, under Section 404(a)(1), "[a] plan administrator who is expressly granted the authority to interpret a benefit plan may not deliberately or negligently misapply [its] terms or contents * * * when specifically requested by a participant to interpret the plan or communicate its contents," Chamber Br. 18.

[26] The fact that an employer makes decisions with respect to future benefits in its capacity as settlor does not mean that it is always reasonably understood to communicate its intentions with respect to those decisions in its capacity as settlor, no matter in what context the communication is made. Disclosure to plan participants of matters relating to benefits is, after all, a core fiduciary function.

will ordinarily not be viewed as a fiduciary representation. In making those determinations, however, a court should look beyond whether a representation specifically references the plan, and take account of the overall context of the representation, considering, for example, the role of the speaker within the company,[27] the impetus and/or stated reason (if any) for the communication, and the content of other statements made in the course of the relevant communication.[28]

4. In this case, although petitioner was urging its employees to make an employment decision, it was at the same time, for its financial benefit, urging those employees (who had expressed concerns respecting their benefits) to give up their rights as participants in the M-F Plan. In the

[27] Although a statement about the employer's financial condition may not raise ERISA concerns if made by the chief financial officer in the context of a financial report, the very same statement may be subject to fiduciary strictures if made by the benefits supervisor in response to employees' concerns relating to the security of their unfunded benefits.

[28] The law applies a similar context-sensitive approach to duality in other, more familiar, circumstances. For example, not every conversation between a lawyer and his client is protected by the attorney-client privilege. Rather, courts examine the overall context of a conversation to determine "whether the client reasonably understood the conference to be confidential." See *Kevlik* v. *Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984), quoting E.W. Cleary, *McCormick's Handbook of the Law of Evidence* § 91, at 189 (2d ed. 1972). Similarly, in determining whether communications by in-house counsel are privileged legal communications or non-privileged business communications, courts look to context to determine the capacity in which the communications were made. See, *e.g.*, *Sedco Int'l, S.A.* v. *Cory*, 683 F.2d 1201, 1205-1206 (8th Cir.), cert. denied, 459 U.S. 1017 (1982). "While such a 'case-by-case' [analysis] may to some slight extent undermine desirable certainty * * *, it obeys the spirit of the Rules." *Upjohn Co.* v. *United States*, 449 U.S. 383, 396-397 (1981).

course of its 30-minute presentation, petitioner presented the employees with written summaries of current benefits under the M-F and MCC Plans, and told the employees that their acceptances were required to ensure uninterrupted benefits. At the same time, and without signalling any shift in its capacity, petitioner represented that, after the transfer, the employees' benefits would remain unchanged, and that the obligor of the new benefits program—MCC—was a financially viable entity. Although statements of the latter sort might not generally fall within the scope of plan administration, in this case those statements were, by design, intertwined with petitioner's communications respecting current benefits. Since petitioner intentionally conflated its roles as employer and fiduciary—and because petitioner has not sought in this litigation to divide the 30-minute session and accompanying written materials into fiduciary and nonfiduciary components and to establish that respondents' injuries are appropriately attributable to the latter, cf. *Waters* v. *Churchill*, 114 S. Ct. 1878, 1891 (1994) (plurality opinion of O'Connor, J.); *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977)—the court below reasonably held petitioner liable for breach of fiduciary duty for misrepresentations made in that session and in the accompanying materials.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1995

(16)

No. 94-1471

In The

Supreme Court of the United States

October Term, 1995

VARITY CORPORATION,

Petitioner,

v.

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

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Petitioner,

v.

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

Respondents move for leave to file a supplemental brief, and in support of their motion state the following:

1. After respondents' brief was completed and filed on July 26, 1995, respondents' counsel discovered another significant argument supporting their position on the first of the two questions presented in this certiorari proceeding.

2. The argument which respondents seek to bring to the Court's attention by way of a supplemental brief is

based on § 502(*l*) of ERISA, 29 U.S.C. § 1132(*l*) (Supp. 1993). Respondents acknowledge that this argument does not involve "late authorities, newly enacted legislation, or other intervening matter that was not available in time to have been included" in respondents' original brief. *See* Supreme Court Rule 25.5. The amendment to ERISA by which § 502(*l*) was enacted became effective in 1989. Respondents nevertheless submit that the Court's consideration of this argument is essential to a full and fair exposition of the questions presented, and that in the interest of justice, leave should be granted to file a supplemental brief.

3. The proposed supplemental brief is appended to this motion. It consists of four pages. In conjunction with the 44 pages of respondents' original brief, respondents' briefs would not exceed the page limit established by Supreme Court Rule 33.

For the foregoing reasons, respondents respectfully request that leave be granted to file the supplemental brief which is appended hereto.

Respectfully submitted,

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No. 94-1471

In The

Supreme Court of the United States

October Term, 1995

VARITY CORPORATION,

Petitioner,

v.

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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SECTION 502(*l*) OF ERISA CONFIRMS THAT PARTICIPANTS AND BENEFICIARIES HAVE A RIGHT OF INDIVIDUAL RECOVERY UNDER § 502(a)(3) FOR BREACH OF FIDUCIARY DUTY

Section 502(*l*) of ERISA, 29 U.S.C. § 1132(*l*) (Supp. 1993),[1] provides in relevant part as follows:

> Civil penalties on violations by fiduciaries
>
> (1) In the case of –
>
> (A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary
>
> * * *
>
> the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.
>
> (2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) –
>
> * * *
>
> (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the

[1] Section 502(*l*) was enacted as part of the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 2101, 103 Stat. 123.

Secretary under subsection (a)(2) or (a)(5) of this section.

The reference in § 502(*l*)(2)(B) to amounts ordered to be paid "to a plan *or its participants and beneficiaries*" establishes that recovery for breach of fiduciary duty is available not only on behalf of a plan but also on behalf of individual participants and beneficiaries in an action brought by the Secretary of Labor. The statute indicates that such recovery may be obtained in an action by the Secretary under either § 502(a)(2) or § 502(a)(5). However, given the Court's interpretation of § 502(a)(2) in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), the statutory reference to recovery on behalf of participants and beneficiaries must be read as relating to actions under § 502(a)(5).

The relevant language of § 502(a)(5) is identical to that of § 502(a)(3), except that the former authorizes actions by the Secretary, while the latter authorizes actions by a participant, beneficiary or fiduciary. Both sections authorize actions "to enjoin any act or practice which violates any provision of this subchapter . . . or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of this subchapter. . . . " Subchapter 1 of ERISA includes § 404, which defines the obligations of an ERISA fiduciary.

The Court has stated that language used in § 502(a)(3) should be deemed to have the same meaning as the same language used in § 502(a)(5). *Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2070 (1993). The language of § 502(*l*) confirms two critical facts about

§ 502(a)(5), and therefore also about § 502(a)(3). First, it confirms that an action to redress a breach of fiduciary duty may be brought under §§ 502(a)(5) and (a)(3). Second, it confirms that in such an action, recovery may be obtained on behalf of individual participants and beneficiaries.

It is important to note that the manner in which § 502(*l*) is relevant to the construction of § 502(a)(3) in this case is quite different than the manner in which the petitioner in *Mertens* sought to make use of § 502(*l*). In *Mertens*, the petitioner argued that § 502(*l*)'s reference to an "applicable recovery amount" demonstrated that money damages must be available in an action under § 502(a)(5), and therefore also in an action under § 502(a)(3). The *Mertens* Court noted, however, that an award of restitution (a traditional equitable remedy) would provide an "applicable recovery amount" for the purpose of § 502(*l*), so that it was not necessary to construe the statute as establishing the existence of a damages remedy. *Mertens*, 113 S. Ct. at 2071. The first question presented in this case is not whether damages are available in an action under § 502(a)(3), but whether participants and beneficiaries have a right of individual recovery for breach of fiduciary duty under ERISA. The feature of § 502(*l*) which speaks forcefully to that issue was not raised or addressed in *Mertens*. For that matter, although § 502(*l*) has been in effect since 1989, the statute's bearing on the question presented in this case apparently has never been addressed in any of the cases decided on either side of the question presented here. The language of § 502(*l*) nevertheless represents another clear and direct indication – in addition to the plain language

of § 502(a)(3) – of Congressional intent that participants and beneficiaries have a right of individual recovery for breach of fiduciary duty under ERISA.

CONCLUSION

For the reasons set forth above and in respondents' original brief, the decision of the court of appeals should be affirmed in its entirety.

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No. 94-1471 (17)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

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September 22, 1995

5 PP

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1471

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

Petitioner Varity Corporation ("Varity") respectfully submits this opposition to respondents' motion for leave to file a supplemental brief that raises, for the first time in this proceeding, an amendment to ERISA enacted six years ago. In support of its opposition, Varity states as follows:

1. What plaintiffs seek to file is nothing more than an improper sur-reply brief, and the instant motion should be denied for that reason alone. Plaintiffs submitted their opposing brief on the merits on July 26, 1995. It did not so much as mention ERISA § 502(l), 29 U.S.C. § 1132(l) (Supp. V 1993), as amended. Varity timely submitted its reply on August 28, 1995. Now, plaintiffs wish to call to the Court's attention an argument they assert they "discovered" after they filed their brief on the merits in opposition, but which they also appear to have discovered only after Varity filed its reply.

Plaintiffs acknowledge that the statute upon which they seek to rely was enacted in 1989; they concede that their proposed brief does not contain any new material permitted to be included in a supplemental brief as contemplated by Rule 25.5 of the Rules of this Court.[1] Under those circumstances, the Rules do not contemplate additional briefing.

2. In any event, plaintiffs are wrong that § 502(l) constitutes a "clear and direct indication . . . of Congressional intent" (Resp. Supp. Br. 3-4) as to whether individuals may sue on their own behalf for breach of fiduciary duty. Section 502(l) was enacted in 1989, fifteen years after passage of ERISA—and thus fifteen years after passage of § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), the provision at

[1] Under Rule 25.5, a party may file a supplemental brief prior to oral argument only to present "late authorities, newly enacted legislation, or other intervening matter that was not available in time to have been included in a brief". We are aware of no case in which the Court allowed a party to file a supplemental brief before argument in order to present information that could have been timely argued. However, in circumstances similar to those here, the Court denied leave. *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 465 U.S. 1097 (1984) (order denying motion to present additional facts and legal argument where movant claimed that it had omitted new material from timely-filed merits brief on advice of printer, *see* Motion for Leave to File Supplemental Brief and Supplemental Brief of Respondent, Greenmoss Builders, Inc. in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-18, filed Mar. 6, 1984 at 2).

issue in this case. At very most, § 502(l) reflects Congress' implicit understanding of a different provision—§ 502(a)(5), 29 U.S.C. § 1132(a)(5) (Supp. V 1993)—fifteen years after that provision was enacted. It has long since been clear that the opinion of a subsequent Congress as to the meaning of a provision of a statute—even the same provision, let alone a different one—is of "little assistance" in determining the meaning of an earlier passed statute. *Public Employees Retirement System* v. *Betts*, 492 U.S. 158, 168 (1989); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958).

3. Finally, the adoption of § 502(l) has no bearing on this action. The new section did not amend § 502(a)(3); it did not even mention it.

Plaintiffs nonetheless assert that the language in § 502(l) referring to amounts paid to "a plan or its participants and beneficiaries" confirms that actions instituted under § 502(a)(5) (and thus, by analogy, § 502(a)(3)) for fiduciary violations may be brought for the benefit of particular individuals themselves as well as for plans. But plaintiffs' reading depends on a formalistic distinction that § 502(l) does not make. As plaintiffs would have it, the reference in § 502(l) to amounts ordered to be paid to a plan's "participants and beneficiaries" applies *only* to § 502(a)(5) actions and not to those brought by the Secretary under § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988)—even though § 502(l) refers to both subsections. Nothing in the language of § 502(l) permits that reading. That being so, the language referring to "its [the plan's] participants and beneficiaries" must be read to apply not only to amounts paid in § 502(a)(5) actions, but to amounts paid in § 502(a)(2) actions as well. Accordingly, because § 502(l) necessarily contemplates that a plan's "participants and beneficiaries" can recover "amounts" in actions brought under § 502(a)(2), which, as this Court held in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134

(1985), may *only* be brought on behalf of a plan, § 502(a)(5) can hardly be read to the contrary.[2]

For the foregoing reasons, this Court should deny respondents' motion for leave to file the supplemental brief.

Dated: New York, New York
September 22, 1995

Respectfully submitted,

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[2] In fact, the only reading of § 502(l) that is consistent with the plain language of §§ 404 and 409, 29 U.S.C. §§ 1104, 1109 (1988 & Supp. V 1993), as well as with this Court's decision in *Russell*, is that under § 502(a)(5), the Secretary may only sue for breach of fiduciary duty on behalf of a plan. Other portions of § 502(l) itself support that reading. *See* ERISA § 502(l)(3)(B), 29 U.S.C. § 1132(l)(3)(B) (Supp. V 1993), as amended (Secretary may waive or reduce penalty, *inter alia*, if it is reasonable to expect that defendant "will not be able *to restore all losses to the plan*") (emphasis added).

(5)

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 215,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities involves regular representation of the interests of its member-employers before the courts, the United States Congress, the Executive Branch and independent regulatory agen-

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[1] This brief is being filed with the written consent of the parties pursuant to this Court's Rule 37.3. Letters of consent are being filed simultaneously with the Clerk of the Court.

cies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a number of ERISA cases decided by this Court.[2]

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans, both pension and welfare, covered by ERISA. The decision below profoundly and adversely affects the Chamber's members by exposing them to liability beyond that contemplated by Congress in ERISA.

SUMMARY OF ARGUMENT

I. Claims of breach of fiduciary duty may not be brought under ERISA section 502(a)(3). The liability of, and causes of action against, ERISA fiduciaries are governed by ERISA sections 409(a) and 502(a)(2). Because Congress has directly addressed the question of actions for breach of fiduciary duty in these sections, the more general language of section 502(a)(3) should not be construed to cover the same ground.

The court of appeals' ruling not only violates this basic precept of statutory interpretation but poses serious practical problems as well. It paves the way for ERISA plan participants to append a fiduciary breach claim under ERISA section 502(a)(3) against additional defendants to a standard contract claim under ERISA section 502(a)(1)(B) against the plan whenever a benefit claim is denied. Claims administrators and other third party service providers—who in most courts today are not

[2] *See Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223 (1995); *District of Columbia* v. *The Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992); *Patterson* v. *Shumate*, 113 S. Ct. 13 (1992); *Ingersoll-Rand* v. *McClendon*, 498 U.S. 133 (1990); *FMC* v. *Holliday*, 498 U.S. 52 (1990); *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete*, 484 U.S. 539 (1988).

susceptible to personal liability to participants for benefits determinations—would be forced to defend and pay recoveries under these additional claims, thereby increasing the overall cost of benefit plan administration and offsetting private sector efforts to manage health care spending.

II. ERISA does not impose upon a person or entity all of the communications duties of a common law trustee whenever such person communicates benefits information. A number of courts, including the one below, have held that ERISA's fiduciary duty rules impose upon persons communicating benefits information to plan participants the affirmative duty to accurately communicate all material information relating to participants' circumstances.

This broad duty fails, however, to give effect to the definition of fiduciary conduct found in section 3(21)(A) of ERISA. Under that section, a person is a fiduciary with respect to a plan "to the extent" he exercises discretionary control or authority over the administration, management, or assets of the plan. The effect of this language is to attach fiduciary obligations to the performance of certain conduct relating to a plan, and only such conduct. In this regard, ERISA does not mirror the common law of trusts. The contrary approach below would encourage plan participants to avoid reviewing and understanding the detailed written materials that ERISA requires be provided to them, and would shift to employers and third party plan administrators the full risk of loss when a plan participant misunderstands his benefits rights and obligations. ERISA's detailed reporting and disclosure rules and circumscribed definition of fiduciary conduct do not support the imposition of such open-ended non-enumerated fiduciary duties of communication.

III. An award of money to reimburse ERISA plan participants for lost health insurance benefits is not "appropriate equitable relief" under section 502(a)(3) of

ERISA, which authorizes the award of only traditional equitable remedies. The attempt by the court below to characterize such relief as "restitution" was in error.

The equitable remedy of restitution has two accepted meanings: (1) recovery based on and measured by unjust enrichment and (2) restoration in kind of a specific thing wrongfully taken away. The relief awarded by the court of appeals conforms to neither of these meanings. Courts and commentators alike have concluded that, to be a legally meaningful concept, restitution must be distinguished from compensation. Because the monetary remedy awarded by the court of appeals was intended to compensate participants for lost benefits, such relief was not "restitution" but ordinary damages. Therefore, it was not authorized by ERISA section 502(a)(3).

ARGUMENT

Implicated in this case are three questions of considerable importance to employee benefit plan sponsors, participants, and service providers. The first is whether ERISA plan participants may bring an action for breach of fiduciary duty—not only under ERISA section 502 (a)(2), which expressly authorizes actions against plan fiduciaries—but also under the general language of ERISA section 502(a)(3), which authorizes courts to award "appropriate equitable relief." The second is whether ERISA imposes upon persons communicating benefits information all of the duties borne by common law trustees. And the third is whether compensatory "restitution" of the sort awarded by the court of appeals in this case falls within the "appropriate equitable relief" authorized by ERISA section 502(a)(3). The answer to each of these questions is no.

I. CLAIMS OF BREACH OF FIDUCIARY DUTY MAY NOT BE BROUGHT UNDER SECTION 502(a)(3) OF ERISA.

In the Employee Retirement Income Security Act of 1974 (ERISA), as amended, Congress set "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans" and provided "appropriate remedies" for violations of those standards. ERISA § 2(b), 29 U.S.C. § 1001(b). ERISA contains a series of interrelated provisions which (1) assign fiduciary status to those who perform certain plan functions; (2) establish standards of conduct according to which such fiduciary duties must be discharged; (3) impose liability and specify available remedies for violations of those standards; and (4) create a cause of action to redress such violations. These provisions governing the obligations and liabilities of ERISA fiduciaries form a seamless statutory web, and it is inappropriate to construe more general language found elsewhere in ERISA to create a freestanding cause of action for breach of fiduciary duty.

Within its definitions section, ERISA declares that "a person is a fiduciary" with respect to a plan "to the extent" he exercises discretionary control or authority over the plan's management, administration, or assets. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Savings Bank*, 114 S. Ct. 517, 523-524 (1993). Section 404 of the statute—captioned "Fiduciary Duties"—requires ERISA fiduciaries *inter alia* to discharge their plan-related duties prudently and solely in the interests of plan participants. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). Section 406 of ERISA adds to these general obligations by prohibiting a fiduciary from involving a plan in certain specified transactions. 29 U.S.C. § 1106.

The liability of, and causes of action against, ERISA fiduciaries are governed by sections 409(a) and 502

(a)(2) of the statute. Section 409(a) "makes fiduciaries liable for breach of the[ir] duties, and specifies the remedies available against them." *Mertens* v. *Hewitt Associates,* 113 S. Ct. 2063, 2066 (1993). Captioned "Liability For Breach of Fiduciary Duty," section 409(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 [29 U.S.C. § 1111] of this Act. [29 U.S.C. § 1109(a).]

In turn, section 502(a)(2) of ERISA—one of the statute's "six carefully integrated civil enforcement provisions," *Massachusetts Mut. Life Ins. Co.* v. *Russell,* 473 U.S. 134, 146 (1985)—provides that "[a] civil action may be brought—by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 of this title." 29 U.S.C. § 1132(a)(2). Section 502(a)(2) is thus "the enforcement provision for section 409." *Russell,* 473 U.S. at 142 n.9. Taken together, sections 409(a) and 502(a)(2) impose liability upon errant fiduciaries, create a cause of action against them, and specify the available remedies.

In *Russell,* this Court held that a plan participant who brought suit under sections 409(a) and 502(a)(2) alleging fiduciary misconduct could not recover extracontractual damages personally, as opposed to for the benefit of the plan.[3] In this case, the court of appeals, adopting the view expressed by Justice Brennan for a minority of the Court in *Russell,* held that a plan participant who brought suit under section 502(a)(3) alleging fiduciary misconduct *could* recover equitable relief personally.[4] The court of appeals' holding was in error.

[3] The Court did say that ERISA permits plan participants and beneficiaries personally to recover "contractual damages"—*i.e.,* "damages for loss of plan benefits." 473 U.S. at 138. Relief of that sort is plainly authorized by section 502(a)(1)(B) of ERISA, which provides that a civil action may be brought by a participant or beneficiary "to recover benefits due to him under the terms of his plan, [and] to enforce his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). *See Russell,* 473 U.S. at 144 (section 502(a)(1)(B) is "the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan").

To begin with, this Court determined in *Russell* that sections 409(a) and 502(a)(2) reflect "Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole." 473 U.S. at 142 n.9. The court of appeals' construction to permit plaintiffs to do under section 502(a)(3) what *Russell* held they could not do under section 502(a)(2)—*i.e.,* recover personally in a fiduciary breach action—is flatly inconsistent with this congressional intent and thus highly implausible in "an enforcement scheme crafted with such evident care." 473 U.S. at 147. *See Vespasian* v. *Sweeney,* No. 93-4343, 1995 WL 154982, *3 n.3 (6th Cir. Apr. 6, 1995) (per curiam) (criticizing the decision below). The better view is that ERISA sections 409(a) and 502(a)(2) "provide[] the sole basis for a suit alleging breach of fiduciary duties." *Simmons* v. *Southern Bell Tel. & Tel. Co.,* 940 F.2d 614, 617 (11th Cir. 1991).

[4] Section 502(a)(3) provides:

> A civil action may be brought—by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. [29 U.S.C. § 1132(a)(3).]

Furthermore, "it is a commonplace of statutory construction that the specific governs the general." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (citing *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)). *See also Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991); *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-736 (1989); *id.* at 738-739 (Scalia, J., concurring in part and in the judgment). This canon of construction strongly points to the conclusion that the general language of section 502(a)(3) does not create a cause of action for breach of fiduciary duty overriding the carefully delimited action found in section 502(a)(2).

Highly instructive in this regard is *HCSC-Laundry* v. *United States*, 450 U.S. 1 (1981) (per curiam). Petitioner in that case was a nonprofit provider of hospital laundry services that sought tax-exempt status as a charitable organization under section 501(c)(3) of the Internal Revenue Code. This Court, however, held that section 501(e) of the Code—which exempts from taxation "cooperative hospital service organizations" that provide certain services to hospitals—was the exclusive Code provision under which petitioner could obtain an income tax exemption. Because laundry services was not one of the services listed in section 501(e), this Court held that petitioner was not entitled to an exemption. It reasoned that "it is a basic principle of statutory construction that a specific statute, here subsection (e), controls over a general provision such as subsection (c)(3), particularly when the two are interrelated and closely positioned, both in fact being parts of section 501 relating to exemption of organizations from tax." 450 U.S. at 6. Since section 501(e) "expressly concerns the tax status of a cooperative hospital service organization," the Court concluded that "subsection (e) is controlling and exclusive, and because petitioner does not qualify under it, exemption is not available." 450 U.S. at 5, 6.

Like the Code provisions at issue in *HCSC-Laundry*, ERISA sections 502(a)(2) and 502(a)(3) are "interrelated and closely positioned" subparts of the same statutory section, and both subsections pertain to the same subject matter—enforcement actions under ERISA. Of the two, however, it is section 502(a)(2) that "expressly concerns" actions for breach of fiduciary duty. Under *HCSC-Laundry*, therefore, section 502(a)(2) must be deemed "controlling and exclusive." Because Congress has spoken directly to the matter of actions for fiduciary breach in section 502(a)(2), the general language of section 502(a)(3) should not be construed to occupy that same field. *Cf. Russell*, 473 U.S. at 147 ("where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it") (quoting *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979)); *see also Kemp* v. *Control Data Corp.*, 785 F. Supp. 74, 76 (D. Md. 1991) (allowing broader relief under section 502(a)(3) than section 502(a)(2) would render the latter "entirely nugatory").

Although the language of section 502(a)(3) might literally be read to make actionable a breach of fiduciary duty claim, this Court has eschewed construing ERISA's terms as broadly as possible when narrower constructions were better suited to the statutory context. In *Russell*, the court of appeals held that compensatory damages were available under that part of section 409(a) authorizing courts to grant "such other equitable or remedial relief as the court may deem appropriate." Yet this Court concluded that to so read section 409(a)'s " 'catchall' remedy * * * would render superfluous" the other language in 409(a) "providing relief singularly to the plan." *Russell*, 473 U.S. at 141, 142.

Similarly, in *Mertens*, the Court construed section 502(a)(3)'s use of the phrase "appropriate equitable relief" to encompass only traditional equitable remedies,

even while conceding that the phrase "can assuredly" have the broader meaning of "whatever relief a court of equity is empowered to provide in the particular case at issue." 113 S. Ct. at 2068-69.[5]

The court of appeals' construction would also create incompatible legal standards for courts hearing benefit claim disputes. In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), this Court held that in actions to recover benefits under ERISA section 502(a)(1)(B), trial courts should review the plan fiduciary's denial under a *de novo* standard, "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. If that authority is provided, the court reviews only for abuse of discretion. *Id.* Consequently, when deciding section 502(a)(1)(B) claims, courts often defer to a fiduciary's administrative judgments and plan interpretations, and approve such interpretations even when the plan may be susceptible to a contrary interpretation more favorable to participants.[6]

But as *Firestone* recognized, *see* 489 U.S. at 113, the act of granting or denying a claim for ERISA regulated benefits is a fiduciary act, cloaking the person rendering

[5] The construction of section 502(a)(3) advanced here does not, of course, render that provision meaningless. ERISA sections "enforceable under section 502(a)(3) include the reporting and disclosure provisions, the minimum participation, vesting, accrual, joint and survivor, and funding standards, the health care coverage continuation provisions, the bonding requirements of ERISA section 412, and the prohibitions of ERISA section 510 against interference with rights protected by ERISA." Employee Benefits Law 616 (S. Sacher, J. Gibbs & H. Shapiro et al. eds. 1991) (footnote omitted).

[6] *See Finley* v. *Special Agents Mut. Benefits Ass'n, Inc.*, 957 F.2d 617, 621 (8th Cir. 1992); *Jordan* v. *Cameron Iron Works, Inc.*, 900 F.2d 53, 55-56 (5th Cir.), *cert. denied*, 498 U.S. 939 (1990); *Chandler* v. *Underwriters Labs., Inc.*, 850 F. Supp. 728, 734 (N.D. Ill. 1994).

the decision with fiduciary status and consequently the twin duties to act prudently and solely in the interests of plan participants. *See* ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). These duties, evolved and derived from the common law of trusts, *see Firestone*, 489 U.S. at 113, require a rigid level of conduct. *See Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.).

If ERISA plan participants could recover directly as a result of improper performance of fiduciary functions, every benefit claim denial will be challengeable both as a contract claim under section 502(a)(1)(B) and a fiduciary breach claim under section 502(a)(3). This will place lower courts in the anomalous position of deferring to the fiduciary's exercise of discretion when deciding the section 502(a)(1)(B) contract claim, and ensuring that those very same judgments evidence scrupulous care and fidelity to the interests of participants when deciding the section 502(a)(3) claim. Whenever both the fiduciary's interpretation of a benefit plan provision and a participant's contrary interpretation are reasonable, ERISA jurisprudence may require the court to rule that the participant has no contract rights under section 501(a)(1)(B) —if the requisite authority to construe the plan has been granted to the fiduciary—and concurrently hold that such participant was the victim of a fiduciary breach directly remediable under section 502(a)(3).

In light of *Firestone* and its progeny, such an illogical result should be avoided by reaffirming the congressional intent identified in *Russell*, *viz.*, that the exclusive cause of action under ERISA for a fiduciary breach is section 502(a)(2), and this section only allows for relief benefiting the plan as a whole.

Indeed, combining section 502(a)(1)(B) and (a)(3) actions in benefit plan disputes will cause considerable mischief in the real world of benefit plan administration.

In the health care arena, for example, employers are increasingly foregoing traditional indemnity insurance arrangements in favor of self-insuring the cost of employee health benefits.[7] They also are turning to third parties to determine health benefits claims and manage the cost of medical services. A company that sponsors and has assumed the obligation to pay health benefits under the terms of an ERISA plan often contracts with outside parties to perform a variety of managed care procedures, such as pre-service certification, utilization review, or individual case management.[8]

If the door were opened under section 502(a)(3) to allow participants to recover directly for fiduciary misconduct, every time an ERISA plan participant disputes whether the plan contract covers a certain medical procedure he undoubtedly would couple an ERISA section 502(a)(1)(B) claim for benefits with a fiduciary breach claim under section 502(a)(3) against additional parties. The contract claim would allow for recovery against the company or trust that is contractually obligated to fund the ERISA plan, and the fiduciary claim would af-

[7] *See* 1994 Foster Higgins National Survey of Employer Sponsored Health Plans 14 (74% of companies with 500 or more employees self-insure).

[8] Utilization review is the process in which a person, committee, or professional health care organization, often comprised of physicians or nurses independent of the treating physician, prospectively recommends or determines whether a hospital stay or surgical procedure is medically necessary and therefore whether the cost for such services will be paid for by the ERISA plan. *See Corcoran* v. *United Health Care, Inc.*, 965 F.2d 1321, 1323 (5th Cir.), *cert. denied*, 113 S. Ct. 812 (1992); John D. Blum, *Analysis of Legal Liability in Health Care Utilization Review and Case Management*, 26 Hous. L. Rev. 191, 192-193 (1989). Individual case or disease management is a process in which plan participants with significant medical problems are closely monitored by an independent physician or physician group designated by the plan or its agents to help coordinate the program of treatment. *See* Blum, 26 Hous. L. Rev. at 193.

ford the possibility of recovery against one or more additional parties providing claims determination services.

If, for example, a utilization review panel determines that proposed surgery is not medically necessary,[9] and the third party plan administrator upholds that determination,[10] it would make little sense for a well-counseled ERISA plan participant who chooses to have the surgery to limit his action to a section 502(a)(1)(B) claim asserting that the procedure was medically warranted and therefore covered under the terms of the plan. In all probability, he will sue members of the utilization review panel and the outside administrator under section 502 (a)(3) for fiduciary imprudence and disloyalty in improperly handling or denying the claim.

Professional claims administrators, physicians, nurses, medical records technicians—any person who as an agent for an ERISA plan exercises discretion in determining claims—would be a target of an ERISA fiduciary claim. Such a result would undoubtedly increase the cost of benefit plan administration, and service providers would seek to pass the costs back to the companies that sponsor plans and pay for benefits. This runs counter to efforts to manage health care spending, and should not be countenanced absent a clear indication from Congress that such a result was intended.

[9] ERISA health benefits plans normally limit coverage to "medically necessary" services, specifically excluding experimental or cosmetic procedures. *See, e.g., Florence Nightingale Nursing Serv., Inc.* v. *Blue Cross/Blue Shield Alabama*, 41 F.3d 1476 (11th Cir.), *cert. denied*, 115 S. Ct. 2002 (1995); *Hendricks* v. *Central Reserve Life Ins. Co.*, 39 F.3d 507 (4th Cir. 1994); *Fuja* v. *Benefit Trust Life Ins. Co.*, 18 F.3d 1405 (7th Cir. 1994).

[10] Section 503(2) of ERISA requires every benefit plan to afford a plan participant the right to appeal a denied claim to a named fiduciary, or its designee. *See* 29 U.S.C. § 1133(2). *See also* 29 C.F.R. § 2560.503-1(g).

II. ERISA'S FIDUCIARY DUTY RULES DO NOT IMPOSE COMMUNICATION OBLIGATIONS UNRELATED TO THE DISCRETIONARY ADMINISTRATION OR MANAGEMENT OF A PLAN.

The second issue in this case concerns the extent to which ERISA imposes fiduciary duties with regard to communications that affect the interests of plan participants. The court of appeals held that Varity Corporation breached its fiduciary duty to respondents by misleading them about the financial health of the subsidiary to which they agreed to transfer. However tempted one might be to characterize petitioner's conduct in pejorative terms, all employers and benefit plan administrators will have to abide by the rule governing fiduciary communications announced in this case, and such a rule will surely apply to factual circumstances quite different from those presented by the record here.

ERISA contains very detailed and comprehensive reporting and disclosure requirements designed to keep plan participants apprised of their rights and benefits.[11] In recent years, however, a number of lower courts have

[11] ERISA generally requires that each plan participant be given a summary plan description ("SPD") soon after becoming a participant. ERISA §§ 101(a), 104(b)(1)(A), 29 U.S.C. §§ 1021(a), 1024(b)(1)(A). The SPD must include, among other things, "the plan's requirements respecting eligibility for participation and benefits," the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," and "the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part." ERISA § 102(b), 29 U.S.C. § 1022(b). The SPD must be understandable to the average person and informative of rights and obligations under the plan. ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1). An updated SPD must be furnished to each participant every five years if the plan has been amended and every ten years if it has not, ERISA § 104(b)(1)(B), 29 U.S.C. § 1024(b)(1)(B), or upon request, ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4). If a benefit plan is amended in any material fashion, a summary of such material modification is to be disseminated to plan participants. ERISA §§ 102(a)(1), 104(b)(1)(B), 29 U.S.C. §§ 1022(a)(1), 1024(b)(1)(B).

held that the duty of ERISA fiduciaries to provide information to plan participants goes beyond these express statutory requirements; these courts hold that ERISA fiduciaries are liable for "failure to provide complete and accurate material information to [plan] beneficiaries." *Bixler* v. *Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1301 (3d Cir. 1993); *see* Pet. App. 13a. This broad duty, in the view of some courts, "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." *Bixler*, 12 F.3d at 1300; *see also Eddy* v. *Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990). These courts have located this duty within the common law of trusts and incorporated it into the duties of prudence and loyalty imposed upon fiduciaries under section 404(a)(1) of ERISA. *See Bixler*, 12 F.3d at 1300 (relying upon Restatement (Second) of Trusts § 173, comment d (1959)); *Eddy*, 919 F.2d at 750 (same).[12] What cases such as *Bixler*, *Eddy*, and the decision below have failed to recognize is that employee benefit plans are structurally distinct from common law testamentary or inter-vivos trusts, and that ERISA, by purpose and design, does not impose all of the communication duties of a common law trustee.

As this Court observed in *Mertens*, ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan." 113 S. Ct. at 2071 (emphasis in original). That is, persons are denominated fiduciaries under ERISA according to what they do with respect to a plan. Key in this regard is ERISA section 3(21)(A), which provides in pertinent part that "a person is a fiduciary with respect to a plan *to the extent* * * * he exercises any discretionary au-

[12] According to that provision of the Restatement, a trustee "is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person."

thority or discretionary control respecting management of such plan, * * * disposition of its assets, * * * [or] the administration of such plan." 29 U.S.C. § 1002(21)(A) (emphasis added).

The effect of the "to the extent" language is to attach fiduciary obligations to the performance of certain conduct relating to an employee benefit plan, and only such conduct. As Judge Easterbrook has rightly observed, "this definition does not make a person who is a fiduciary for one purpose a fiduciary for every purpose. A person 'is a fiduciary to the extent that' he performs one of the described duties; people may be fiduciaries when they do certain things but be entitled to act in their own interests when they do others." *Johnson* v. *Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994) (citing *John Hancock*, 114 S. Ct. at 523-525).[13]

ERISA limits the scope of fiduciary behavior because it envisions and accepts that many employers will act in a dual role in connection with their benefit programs. As non-fiduciary plan sponsors, employers engage in the business-planning function of determining what kinds and amounts of benefits to provide to employees and how such benefits will be funded. As fiduciaries, employers manage or administer the plan's operations, or, as is increasingly the case, appoint and monitor the performance of outside professionals to perform such functions. *See* p. 12, *supra*.[14] ERISA's circumscribed definition of fiduciary behavior ensures that the heightened standard of conduct imposed upon fiduciaries does not impede employers' ability to structure competitive, cost-efficient benefit programs and make ordinary business operation decisions.

[13] *See* 29 C.F.R. § 2509.75-8 FR-16 Q&A (1994); *Klosterman* v. *Western Gen. Mgmt., Inc.*, 32 F.3d 1119, 1122 (7th Cir. 1994); *Blaw Knox Retirement Plan* v. *White Consolid. Indus., Inc.*, 998 F.2d 1185, 1189-90 (3d Cir. 1993); *Amato* v. *Western Union Int'l, Inc.*, 773 F.2d 1402, 1416 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 113 (1986); *see also* Employee Benefits Law, *supra*, at 267.

[14] In this regard, the structure of employee benefit plans is different from traditional common law trusts, where the same person ordinarily does not serve as both trust settlor and trustee. *See generally* George G. Bogert & George T. Bogert, The Law of Trusts & Trustees §§ 104, 121 (2d rev. ed. 1984).

The cases that have ascribed to ERISA fiduciaries all of the duties of a common law trustee whenever a person communicates benefits information have failed to recognize that ERISA's definition of fiduciary conduct represents an "express statutory departure" from the common law, *Mertens*, 113 S. Ct. at 2073 (White, J., dissenting).[15] A misrepresentation made to a plan participant can be a violation of ERISA's fiduciary duty rules *only if the making of the statement itself constitutes the exercise of discretionary authority or control over the management, administration, or assets of the plan.* Similarly, the omission of information in a communication to a plan participant can be a violation of ERISA's fiduciary duty rules *only if the communication represents the exercise of discretionary authority over the management, administration, or assets of the plan.* Consideration of four hypothetical cases will identify where the boundaries should be drawn.

• *Case One*: An employee asks the plan administrator if a much needed but expensive medical procedure he is contemplating is covered by the company health plan. The health plan SPD provides that the administrator is

[15] Although ERISA has roots in the common law of trusts, not every common law trust principle was transplanted into the statute. *See Firestone*, 489 U.S. at 110 ("ERISA's legislative history confirms that the Act's fiduciary responsibility provisions * * * 'codif[y] and mak[e] applicable to [ERISA] fiduciaries *certain* principles developed in the evolution of the law of trusts'") (emphasis added) (brackets by the Court) (quoting H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973)); *Nieto* v. *Ecker*, 845 F.2d 868, 872 n.2 (9th Cir. 1988) (rejecting the "broad[] proposition that ERISA meant to adopt the entire body of state trust law lock, stock and barrel").

responsible for interpreting the plan. The administrator, who personally dislikes the employee, states that the procedure is covered. In fact, the administrator is well aware that although the plan does not expressly refer to the contemplated procedure, the procedure falls under a category of excluded medical services and the plan has historically denied coverage for it. The employee suffers significant out-of-pocket expenses when the plan subsequently denies reimbursement.

This misrepresentation violates ERISA's fiduciary duty rules. A plan administrator who is expressly granted the authority to interpret a benefit plan may not deliberately or negligently misapply the terms or contents of a plan when specifically requested by a participant to interpret the plan or communicate its contents. When a person charged with interpreting the plan is asked to apply the plan to a specific set of facts, that application constitutes a discretionary exercise of control or authority over the plan's administration and a fiduciary activity.[16]

• *Case Two*: A plan provides that upon termination of employment, a former employee may continue his life insurance by converting his group policy into an individual policy. A retiring employee asks his human rights supervisor what he must do to preserve his life insurance coverage and is told to consult his SPD, which expressly explains the conversion rights. The employee does not read the SPD, remains ignorant of his conversion rights, and does not convert his policy. Upon the former employee's death, his spouse files a claim for benefits but the claim is denied because the policy was never converted. The spouse complains that the supervisor should

[16] The result in Case One would be different if the employee had posed his question about coverage to his line supervisor or anyone else who under the terms of the plan lacks interpretive authority. A plan participant would have little cause to rely on such person's judgment concerning the plan, and such person would not act in a fiduciary capacity when rendering an opinion.

have made sure that her husband understood his conversion rights when he asked about them upon his retirement.

No breach of fiduciary duty is entailed by the employer's failure to ensure that the retiring employee understood his conversion rights. Neither an employer nor outside plan administrator is obligated as part of its administrative duties to make sure that each individual participant is fully cognizant of his rights under a plan.[17] By referring the employee to the SPD—which must be understandable to the average person and informative of rights and obligations, *see* 29 U.S.C. § 1022(a)(1), and which explained the rules—the employer has discharged its administrative duties.

• *Case Three*: As part of a corporate down-sizing, an employer decides on November 1 that it will amend its plan effective January 1 to enhance the plan's retirement benefits. Before the plan change is announced, an employee contemplating retirement asks a human resources supervisor if (as rumor has it) the company is considering the adoption of any incentives for early retirement. The supervisor is aware of the decision but does not want to make it known until it is formally announced on December 15, so her answer is noncommittal. The employee retires effective December 1 and does not benefit from the plan change.

The employer has not breached any fiducary duty under ERISA. The employer's failure to advise the employee that he ought to wait until January 1 to retire does not relate to the management or administration of the current version of the plan. Rather, it relates to the company's determination of the future design of the plan. The statement made in Case Three was made in a "cor-

[17] *See Maxa* v. *John Alden Life Ins. Co.*, 972 F.2d 890, 985-986 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1048 (1993); *Stahl* v. *Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1409 (9th Cir. 1989); *Cummings* v. *Briggs & Stratton Retirement Plan*, 797 F.2d 383, 387 (7th Cir.), *cert. denied*, 479 U.S. 1008 (1986).

porate nonfiduciary capacity." *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1323 n.28 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1699 (1995).

• *Case Four*: An employer that also serves as plan administrator makes a material modification to a plan and provides a summary description of the modification to participants immediately prior to its effective date. A plan participant alleges that he was harmed by not being informed of the plan change sooner.

The employer has not breached its fiduciary duties. The employer provided a summary description of the modification, which functions as an amendment to the SPD,[18] within the time set in ERISA.[19] By communicating the modification prior to its effective date the employer ensured that participants would not be in possession of an SPD whose terms had lapsed, expired, or become misleading. Although the conduct at issue certainly relates to the administration of the plan, ERISA speaks directly to this matter through its rules governing the content of SPDs and the communication of material modifications, and no fiduciary liability can be imposed for acting in conformity with ERISA's express requirements.

* * *

To summarize, *amicus curiae* acknowledges the importance of benefit plan administrators satisfying the carefully considered reporting and disclosure duties enumerated in ERISA, and submits that persons expressly charged with the duty to interpret a benefit plan breach

[18] *See* 29 C.F.R. §§ 2520.104b-3(a), 3(c) (summary of material modification required whenever plan is amended to alter terms described in SPD).

[19] Under section 104(b)(1)(B) of ERISA, a plan administrator must provide participants with a summary of any material modification of the plan "not later than 210 days after the end of the plan year in which the change is adopted." 29 U.S.C. § 1024(b)(1)(B).

their fiduciary responsibilities under section 404(a)(1) of ERISA if they deliberately or negligently misrepresent the terms or conditions under which a benefit plan operates when expressly asked to interpret such terms or conditions. But the text and structure of ERISA do not support the imposition of additional fiduciary duties of communication.

Limiting the liability of persons when they make statements (or fail to make statements) that affect employees' interests in their ERISA-regulated benefits is a fair rule. Fundamentally, the issue here is who should bear the risk when a plan participant suffers a loss based upon a misunderstanding about a plan.

The effect of a rule imposing on employers or outside administrators a duty to communicate all information material to a plan participant's particular circumstances, *see* Pet. App. 13a; *Bixler*, 12 F.3d at 1300; *Eddy*, 919 F.2d at 750, is to shift the risk of loss when misunderstanding occurs from the employee to the employer or outside administrator. The rule embraced by the court of appeals will encourage employees to avoid reviewing and understanding the written benefit plan materials that ERISA requires to be provided, *see* note 11, *supra*, and to resort to oral inquiries to learn about their benefits. It creates this incentive by forcing benefits administrators to undertake a lengthy analysis every time they receive an inquiry—to ensure that they understand the participant's particular circumstances—and to communicate sufficient information so that the participant understands all rights and duties germane to those circumstances. The risk is particularly acute in oral communication because even if benefits personnel impart accurate and complete information, the participant may later claim that such information was not provided.

The inevitable result will be more benefit plan paperwork to memorialize oral communication and increased

costs for welfare benefit plans. *Cf. Mertens*, 113 S. Ct. at 2072. Invariably, employers will cut back on the benefits offered.

It is of course true that the value of a benefits plan is lost upon a participant ignorant of his rights. For that reason, ERISA mandates that plan administrators provide participants in writing all material information relating to the plan. Furthermore, participants ought to be able to make oral inquiries about specific terms and conditions of the current plan without having persons charged with interpreting the plan provide deliberately false or negligent responses.

But ERISA does not make plan fiduciaries responsible for assuring that each plan participant has perfect knowledge about his rights under a plan. The statute recognizes that individuals are in the best position to educate themselves about a plan when they have been provided in writing all essential information and can study and apply that information to their own needs and circumstances.

III. THE MONETARY RELIEF AWARDED BY THE COURT OF APPEALS WAS NOT "APPROPRIATE EQUITABLE RELIEF" WITHIN THE MEANING OF ERISA SECTION 502(a)(3).

In *Mertens*, this Court held that the portion of section 502(a)(3) which authorizes the award of "appropriate equitable relief" is limited to traditional equitable remedies and does not include legal relief. 113 S. Ct. at 2068-70. After paying lip service to that holding, the court of appeals awarded what it said was "restitution" but what in truth can only be described as compensatory damages. Because the court of appeals' decision obliterates the distinction between legal and equitable relief, and thus

renders meaningless the holding of *Mertens*, it cannot stand.[20]

The court of appeals held that the plaintiffs were entitled to receive "payments of money that [they] would have received if they had remained members of the M-F Plan." Pet. App. 18a. Although acknowledging that damages are unavailable under section 502(a)(3), the court said that this remedy was "in the nature of restitution to compensate [plaintiffs] for benefits of which, at the time of trial, they had been deprived." *Id.*[21] Although restitution was a remedy "typically available in equity," *Mertens*, 113 S. Ct. at 2069 (emphasis omitted),[22] the court's award of money to reimburse plaintiffs for lost health benefits cannot fairly be characterized as restitution.

Restitution has two widely-accepted meanings. First, restitution "means recovery based on and measured by unjust enrichment." Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1279 (1989). *See also* Restatement of Restitution § 1 (1937)

[20] Under this Court's Rule 14.1(a), the propriety of the relief awarded by the court of appeals under section 502(a)(3) is a "subsidiary question fairly included" within the first question upon which certiorari was granted. *Cf. Missouri* v. *Jenkins*, No. 93-1823 (June 12, 1995) (slip op. at 12-13).

[21] Judge Hansen dissented from this part of the panel's opinion, saying that "[i]n my view our court has taken what the trial court determined were 'compensatory damages' * * * and has fashioned equitable relief by calling it all by another name, i.e., in the nature of restitution." Pet. App. 21a (quoting Pet. App. 114a).

[22] It should be noted, however, that while restitution was *typically* available in equity, it was not *exclusively* a remedy of equity. *See* 1 George Palmer, The Law of Restitution § 1.1, at 3 (1978) ("for a long time restitution developed more or less independently at law and in equity"); *First Nat'l Bank of Waukesha* v. *Warren*, 796 F.2d 999, 1000 (7th Cir. 1986) ("remedies known as 'restitution' were available in courts of law and equity alike before their merger") (Easterbrook, J.).

("[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other"); 1 George Palmer, The Law of Restitution § 1.1, at 2 (1978) (restitution "is liability based in unjust enrichment"). Such recovery is based upon and measured by the extent of the defendant's gains, not the plaintiff's losses. *See* Laycock, *supra*, at 1279; 1 Palmer, *supra*, § 1.1, at 4 (2d Cum. Supp. 1994).

The second proper but less common use of the term is "restoration in kind of a specific thing." Laycock, *supra*, at 1279. *See also* Restatement of Restitution § 4 comments c, d (1937); *id.* § 128; 1 Dan B. Dobbs, Law of Remedies § 4.1, at 551 (2d ed. 1993). In this sense, restitution means the return of the very item wrongfully taken away.

Restitution "is sometimes used in a third sense—to restore the value of what plaintiff lost," Laycock *supra*, at 1282, but that usage has been heavily criticized:

> [R]estitution of the value of what plaintiff lost is simply compensatory damages. Used in this sense, "restitution" loses all utility as a means of distinguishing one body of law from another. Restitution must be distinguished from compensation, either by its focus on restoration of the loss in kind or by its focus on defendant's gain as the measure of recovery. [*Id.* at 1282-83]

Indeed, a number of courts have accepted Professor Laycock's argument that, to be a legally meaningful concept, restitution must be distinguished from compensation. *See* *Waldrop* v. *Southern Co. Servs., Inc.*, 24 F.3d 152, 158-159 (11th Cir. 1994); *Hubbard* v. *Administrator, EPA*, 982 F.2d 531, 539 n.12 (D.C. Cir. 1992) (en banc); *Pratt* v. *Watkins*, 946 F.2d 907, 911-912 n.6 (Temp. Emer. Ct. App. 1991). Thus, as the D.C. Circuit recently remarked, "[w]hatever restitution may encompass * * * we clearly may not collapse it into the broader notion of 'compensation.'" *Crocker* v. *Piedmont Aviation, Inc.*,

49 F.3d 735, 747 (1995). This Court too has recognized that restitution and compensation are distinct. *See, e.g., Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 24 n.14.

The sums of money awarded by the court of appeals cannot be described as "restitution" except in the impermissible sense of compensation. Indeed, the court of appeals twice said that the award was given to the plaintiffs "to compensate them." Pet App. 18a. It is clear that the award does not fall within the second meaning of restitution—the return of a specific thing taken away. It is equally clear that the award was not rooted in unjust enrichment. The court of appeals did not base the award upon whatever "gain" petitioner realized but rather upon the plaintiffs' loss—*i.e.*, the "money that plaintiffs would have received if they had remained members of the M-F Plan." Pet. App. 18a. And even if the award were based upon a gain to petitioner, because petitioner had reserved the right to terminate completely the plan at any time, and had communicated this right to plan participants, Pet. App. 8a-10a, it is far from clear that any "enrichment" was "unjust."

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), this Court held that the Eleventh Amendment barred a federal court from requiring a state to make retroactive payment of welfare benefits. In so doing, this Court rejected the district court's conclusion that the award was a form of "equitable restitution," *id.* at 665, permissible under *Ex Parte Young*, 209 U.S. 123 (1908), and instead saw it as "a form of compensation * * * in practical effect indistinguishable in many aspects from an award of damages * * * [and] measured in terms of a monetary loss from a past breach of a legal duty on the part of the defendant state officials." 415 U.S. at 668. Because that statement could just as easily characterize the award at issue here, that award cannot be described as "equitable restitution."

In sum, it is clear that the "restitution" awarded by the court of appeals was nothing more than garden variety compensatory damages—what *Mertens* called "the classic form of *legal* relief." 113 S. Ct. at 2068 (original emphasis).[23] This Court should rectify the distortion of ERISA and *Mertens* engineered by the court of appeals.

CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[23] In addition to characterizing its remedy as restitution, the court of appeals also relied upon the saying that "[e]quity will treat that as done which ought to have been done." Pet. App. 19a. This is not a traditional equitable remedy, however, but rather an equity maxim—one of "the general principles which govern the courts of equity in the determination of controversies." Henry L. McClintock, Principles of Equity § 24, at 52 (2d ed. 1948). It has been said that "[t]he maxim that equity regards that as done which ought to be done is often more misleading than helpful." *Id.* at 53.

(6)

No. 94-1471

In The

Supreme Court of the United States

October Term, 1994

Varity Corporation,
Petitioner,
v.
Charles Howe, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

**BRIEF AS *AMICI CURIAE* OF
EASTMAN KODAK COMPANY,
ROCKWELL INTERNATIONAL CORPORATION,
TURNER BROADCASTING SYSTEM, INC.,
AND W. R. GRACE & CO.
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*

Amici are corporations located throughout the United States that sponsor employee benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). The decision of the Court of Appeals in this case concerns *amici* because it expands plan sponsors' potential liabilities and costs of litigation by holding that

employees may be able to recover, through a claim for breach of fiduciary duty, benefits to which they would not be entitled under the terms of an employee benefit plan. Moreover, the decision imposes broad and ill-defined fiduciary duties on plan sponsors to advise employees of corporate decisionmaking and actions that may affect employee benefits.

The Court of Appeals observed that its holding would serve to remedy "an egregious wrong" in this case. *Amici* are concerned, however, that, unless reversed by this Court, the decision below will expose them to likely litigation and possible liability under ERISA for business decisions and actions that are neither egregious nor wrong but are properly undertaken in the interests of their shareholders. Accordingly, *amici* request that the Court consider their views on the important questions presented by this petition.[1]

SUMMARY OF ARGUMENT

The Court of Appeals held that petitioner had breached a fiduciary duty by making misleading statements to employees about corporate changes that affected their employee benefits and that respondents could recover individual relief for such a breach through a cause of action asserted under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).

[1] This brief is filed with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court with this brief.

The Court of Appeals erred in holding that individual relief could be recovered on a claim for breach of fiduciary duty. Section 409 of ERISA, 29 U.S.C. § 1109, which defines liability for breach of fiduciary duty under ERISA, has been definitively construed by this Court as authorizing only plan-wide, not individual, relief. In reading the general provision of § 502(a)(3) as authorizing individual relief for breach of fiduciary duty, the Court of Appeals effectively rendered meaningless the preclusion of such relief in § 409(a).

The Court of Appeals also erred in holding that the communications at issue were made by petitioner in a fiduciary capacity. An employer does not act in a fiduciary capacity when making decisions about future changes to an employee benefit plan, and ERISA's fiduciary duty provisions should not be read, inconsistently with ERISA's express disclosure rules, to require premature disclosure of consideration of such changes.

Because the Court of Appeals erred both in finding a breach of fiduciary duty and in awarding individual relief for such a breach, its judgment should be reversed.

ARGUMENT

I. Remedies for Breach of Fiduciary Duty Should be Limited to Plan-Wide Relief

The first question presented by the petition is whether ERISA permits plan participants and beneficiaries to obtain relief on their own behalf for a breach of fiduciary duty. In

holding that ERISA does permit such relief, the Court of Appeals erred, and its decision should be reversed.

In enacting Title I of ERISA, Congress declared it national policy "to protect . . . the interests of participants in employee benefit plans" by, among other things,

> . . . establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b). To implement this policy, Congress created a "commodious[]" statutory definition of fiduciary status "with respect to a plan" and imposed on those who meet that definition strict standards of conduct drawn mainly from principles of trust law. *John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank,* 114 S. Ct. 517, 524 (1993); ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). *See generally* ERISA §§ 404-07, 29 U.S.C. §§ 1104-07; *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-332 (1981).

Congress also included in ERISA a set of interlocking provisions specifically designed to provide for the enforcement of these federal fiduciary standards. Central to this enforcement structure is § 409, captioned "Liability for breach of fiduciary duty," which defines the remedies available for a breach of fiduciary duty. Section 3(21)(A)'s definition of fiduciary status as "with respect to a plan" is

echoed in § 409's limitation of its remedies to plan-wide relief. Section 409 provides, in part:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

To effectuate these remedies, Congress enacted § 502(a)(2), 29 U.S.C. § 1132(a)(2), which authorizes a cause of action to obtain "appropriate relief under Section 409." Congress also provided in § 413, 29 U.S.C. § 1113, a statute of limitations which is the only express statute of limitations in Title I of ERISA and which specifically governs actions asserting a breach of fiduciary duty.

In short, ERISA provides a package of provisions unique to the enforcement of the fiduciary duties established by §§ 404-407, including the remedies provision of § 409, the cause of action provided by § 502(a)(2), and the statute of limitations in § 413. This carefully tailored enforcement structure has been previously reviewed by the Court in *Massachusetts Mutual Life Insurance Co. v. Russell* ("*Russell*"), 473 U.S. 134 (1985). *Russell* involved a claim brought by an ERISA plan participant seeking compensatory

and other damages under § 502(a)(2) for a fiduciary's alleged mishandling of her claim for plan benefits. The Court unanimously held that "appropriate relief under section 409," the only relief authorized in a § 502(a)(2) action, was limited to "remedies that would protect the entire plan" and did not permit individual remedies for participants or beneficiaries. *Id.* at 142. In support of this conclusion, the Court observed that "the principal statutory duties imposed" on fiduciaries under ERISA govern conduct with plan-wide impact, such as investment of plan assets, rather than conduct that affects benefit rights of individual plan participants and beneficiaries. *Id.*

Justice Brennan's concurring opinion in *Russell* noted that the Court had resolved only the question of whether individual damages were available in an action under § 502(a)(2) to obtain the remedies authorized in § 409. His opinion suggested, however, that individual damages would be available through an action under § 502(a)(3), which does not by its terms refer to § 409. *Russell*, 473 U.S. at 150.

Section 502(a)(3) authorizes a civil action by a participant, beneficiary, or fiduciary

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or
>
> (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan;

Respondents in this case brought suit seeking, *inter alia*, to recover from petitioner[2] benefits to which they were not entitled under plan terms but to which they asserted they would have been entitled but for a breach of fiduciary duty. The Court of Appeals affirmed the district court's judgment awarding respondents under § 502(a)(3) the individual relief they sought on this claim. Following the reasoning of the *Russell* concurrence and stating that the "plain language" of § 502(a)(3) "certainly favors [respondents'] position" (App. 14a-15a), the Court of Appeals held that respondents could recover, through a claim for breach of fiduciary duty brought under § 502(a)(3), individual relief that would be unavailable through an otherwise identical claim asserted under § 502(a)(2). (App. 16a.)

The Court of Appeals was correct in observing that, if read in a vacuum, the language of § 502(a)(3) does not preclude awards of individual relief for a breach of fiduciary duty. Section 502(a)(3) -- and its companion provision, § 502(a)(5), 29 U.S.C. § 1132(a)(5), which provides a virtually identical cause of action to the Secretary of Labor -- authorizes a suit for equitable relief to remedy violations of plan provisions or of any provisions of Title I of ERISA. On the other hand, § 502(a)(3) is written in general terms and does not specifically authorize, or even refer to, claims for breach of fiduciary duty.

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[2] The sole petitioner in this Court is Varity Corporation ("Varity"). Original defendants in the case included Varity and its then-subsidiary Massey-Ferguson, Inc., which no longer exists as a separate entity. For the sake of convenience, this brief refers to the defendants collectively as "petitioner" or "Varity."

The question presented here is not whether the cause of action under § 502(a)(3) could, standing alone, be interpreted as providing individual relief for a breach of fiduciary duty but whether it should be so interpreted when such an interpretation would override § 409's preclusion of such relief. It is a well-recognized rule of statutory construction that

> [h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'

Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944), quoting *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932). That rule is particularly appropriate where, as here, Congress has designed for the precise type of claim under consideration an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute'." *Russell*, 473 U.S. at 146, *quoting Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

Section 409 is unquestionably a provision specifically designed to define the scope of liability for breach of fiduciary duty. Indeed, § 409 is captioned "Liability for breach of fiduciary duty" and the definition of that liability is its sole function. The integrated provisions which Congress provided to govern and enforce ERISA's fiduciary standards, discussed *supra* at 4-5, provide strong evidence that Congress intended those provisions to be comprehensive

and exclusive; there is no indication in the statutory text, the legislative history or elsewhere that § 409's definition of this liability was intended to be otherwise.[3] To read § 502(a)(3) as providing a remedial alternative to § 409, as the Court of Appeals did, deprives § 409 of its intended exclusivity.

If individual relief for a breach of fiduciary duty could be obtained simply by asserting a claim under § 502(a)(3) rather than an otherwise identical claim under § 502(a)(2), then § 409's preclusion of individual relief would be rendered meaningless. Moreover, under such a reading, § 409's broad authorization of equitable relief for a breach of fiduciary duty -- and its specific authorization of the equitable remedy of restitution of improper fiduciary profits -- would be rendered superfluous, since that relief would merely duplicate the equitable relief available under § 502(a)(3).

In contrast, reading § 502(a)(3) as *not* encompassing claims for breach of fiduciary duty would not impair § 502(a)(3)'s effectiveness in providing remedies for violations either of plan provisions or of other statutory provisions. Rather, § 502(a)(3) would still fully serve its statutory function as a catch-all cause of action to enforce the many substantive provisions of Title I of ERISA that, unlike the fiduciary duty provisions, are not accompanied by specific enforcement provisions. For example, § 502(a)(3) provides the sole cause of action available to enforce § 510 of ERISA,

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[3] Indeed, the legislative history of ERISA supports the conclusion that Congress intended the plan-wide remedies provided in § 409 to be exclusive. *See Russell*, 473 U.S. at 140 and n.8.

29 U.S.C. § 1140, which prohibits, *inter alia*, actions taken for the purpose of interfering with the attainment of benefit rights. *See Teumer v. General Motors Corp.*, 34 F.3d 542, 544 (7th Cir. 1994); *Spinelli v. Gaughan*, 12 F.3d 853, 856 (9th Cir. 1993). *See also Uselton v. Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564, 582 (10th Cir.) (§ 502(a) (3) "grants plan participants and beneficiaries the right to bring a private action . . . to enforce ERISA's plan disclosure, funding, and administrative requirements"), *cert. denied*, 502 U.S. 983 (1991). None of these actions would be affected by a holding that § 502(a)(2) and § 409 provide the exclusive route for asserting claims for breach of fiduciary duty.

The potential conflict between § 502(a)(3) and § 409 cannot be resolved by characterizing the equitable relief available under § 502(a)(3) as merely supplementary to the relief available under § 409. Section 409's limitation on equitable relief to plan-wide relief would be superseded, not supplemented, if it could so easily be evaded by asserting a breach of fiduciary duty claim under § 502(a)(3) rather than under § 502(a)(2). In *Bulova Watch Co. v. United States*, 365 U.S. 753 (1961), the Court was asked to determine which of two Internal Revenue Code provisions governing the interest payable to a taxpayer on an overpayment would apply to petitioner's situation. *Id.* at 754. One provision specifically determined the allowance of interest on overpayments attributable to unused excess profits credit carry-backs and did not provide interest for the period prior to filing of a refund claim. The other provision related to interest on tax overpayments generally and did provide for interest during the pre-filing period. Citing the "familiar law that a

specific statute controls over a general one," the Court held that the specific provision controlled. *Id.* at 758. *See also Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957) (finding that a specific venue provision for patent infringement actions could not be supplemented by general federal venue provisions). Exactly the same analysis should apply here.

Beyond its reading of the "plain language" of § 502(a)(3), the Court of Appeals stated that it was following the reasoning of the concurrence in *Russell* that traditional trust law principles allowing individual relief for breach of fiduciary duty should be incorporated into ERISA. (App. at 15a.) While the Court has several times noted the connection between ERISA's fiduciary duty provisions and trust law principles (*see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 110; *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559, 570 (1985)), the Court has also declined to read ERISA as incorporating trust law *remedies* not specifically provided in the statutory text. *See Russell*, 473 U.S. at 144 (refusing to allow extra-contractual damages in a claim for breach of fiduciary duty); *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2067-69 (1993) (refusing to allow a damage remedy as "equitable relief" against a non-fiduciary). Similarly here, because ERISA's statutory enforcement structure limits remedies for breach of fiduciary duty to plan-wide relief, trust law provides no basis for incorporation of additional remedies.

The Court of Appeals also stated that it was following the reasoning of the court in *Anweiler v. American*

Electric Power Service Corp., 3 F.3d 986 (7th Cir. 1993). (App. 16a.) In *Anweiler*, a panel of the Seventh Circuit reversed, in light of this Court's intervening decision in *Mertens v. Hewitt Assocs.*, the same panel's earlier decision that individual relief was *not* available on a claim for breach of fiduciary duty asserted under § 502(a)(3). As support for its reversal of position, the Seventh Circuit noted, without further explanation, that *Mertens* "clearly indicates the importance and availability of equitable relief." 3 F.3d at 993. *Mertens*, however, is hardly a decision that supports an award of individual relief for breach of fiduciary duty. To the contrary, *Mertens* emphasizes that ERISA does not automatically incorporate trust law remedies and directly rejects the position of the *Russell* concurrence that § 502(a)(3) provides a basis for awarding individual damages as relief for a breach of fiduciary duty.[4] *See Mertens*, 113 S. Ct. at 2070. In short, *Anweiler*'s reliance on *Mertens* is

[4] The *Anweiler* court also based its interpretation of *Mertens* on the fact that it was urged to do so by "the Secretary of Labor in an *amicus curiae* brief" and that "[t]he Secretary's interpretation of the law which he is authorized to enforce" merits deference. 3 F.3d at 993. However, the Secretary's *amicus* position regarding a private cause of action is entitled to no deference. "We have never applied the principle [of deference to agency interpretation] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988), *citing Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971).

misplaced and does not support the holding of the Court of Appeals in this case.

Equally unpersuasive is the rationale of the other circuit decision holding that individual relief for a breach of fiduciary duty can be obtained under § 502(a)(3). *See Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993). *Bixler* also relied primarily on the *Russell* concurrence and, although issued almost seven months *after* this Court's decision in *Mertens,* failed even to mention *Mertens* or to consider *Mertens'* impact.[5] *Bixler*, 12 F.3d at 1298-99. Accordingly, *Bixler* adds no support for the holding of the Court of Appeals in this case.[6]

Finally, the Court of Appeals observed that a holding that no individual relief was available on a claim for breach of fiduciary duty "would leave unredressed an egregious wrong." (App. 16a.) The court's desire to provide relief to respondents, however, cannot "engraft a remedy on a statute, no matter how salutary, that Congress did not intend to

[5] For example, *Bixler* cited favorably to circuit court decisions holding that a § 502(a)(3) cause of action permitted the recovery of monetary damages as "equitable relief" for a breach of fiduciary duty, failing to note that such decisions were effectively overruled by *Mertens*. *See Bixler*, 12 F.3d at 1300 n.17.

[6] Although the Court of Appeals did not discuss contrary authority from other circuits, two Courts of Appeal have squarely held that § 502(a)(3) does not authorize individual relief for a breach of fiduciary duty. *See McLeod v. Oregon Lithoprint Inc.*, 46 F.3d 956 (9th Cir. 1995); *Whisman v. Loran Robbins*, No. 93-3983/93-4030, 1995 U.S. App. LEXIS 13488, 1995 WL 324593 (6th Cir. June 1, 1995).

provide." *Russell*, 473 U.S. at 145, *quoting California v. Sierra Club*, 451 U.S. 287, 297 (1981). Moreover, the court's observation that respondents would otherwise be remediless is, at least, premature as applied to this case. Respondents' breach of fiduciary duty claim presented only one of three grounds on which the district court awarded judgment against petitioner; in light of its holding, the Court of Appeals expressly declined to address the other two grounds (estoppel and interference with benefit rights). (App. 17a n.5.) Accordingly, if this Court were to reverse the judgment, two independent bases for a remedy would remain to be addressed by the Court of Appeals.

Amici's concern with the Court of Appeals' decision goes beyond the flaws in its legal analysis. ERISA already has an express cause of action in § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which allows participants and beneficiaries to enforce their rights to benefits provided by the terms of a plan. The practical impact of the Court of Appeals' decision is to create an alternative cause of action for benefits that would perversely parallel § 502(a)(1)(B) by authorizing recovery, through a claim for breach of fiduciary duty asserted under § 502(a)(3), of benefits *not* provided by a plan's terms. If this cause of action were allowed, every claim for benefits could, alternatively, be cast in the form of a claim for breach of fiduciary duty. Litigation of benefit claims would greatly expand and would focus not on whether a claimant was eligible for benefits but on whether the claimant's ineligibility could be shown to be the fault of someone alleged to be a fiduciary. Even if plan sponsors prevailed in the vast majority of these actions, the litigation costs alone would deter companies from establishing or

improving benefit plans, thus defeating what this Court has previously recognized as "the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). *See also Mertens*, 113 S. Ct. at 2072.

Accordingly, in order to avoid circumvention of § 409's specific limitation on relief for breach of fiduciary duty to plan-wide relief and for the other reasons discussed above, this Court should reverse the decision of the Court of Appeals and hold that § 502(a)(3) does not provide a basis on which participants can obtain individual relief for a breach of fiduciary duty.

II. Employers Do Not Act as Fiduciaries in Communicating With Employees About Matters that Do Not Involve Plan Administration

The second question presented by the petition is whether petitioner breached a fiduciary duty when it failed to disclose to employees its expectation that their welfare benefits would be terminated. *Amici* urge the Court to resolve this question by reversing the judgment of the Court of Appeals on the ground that petitioner was not acting as a fiduciary in making the communications at issue. An employer that acts in a fiduciary capacity by administering an employee benefit plan does not thereby subject itself to ERISA's fiduciary duties in all of its dealings with employees that implicate the plan.

Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), defines the term 'fiduciary' in functional terms rather than solely by reference to title or position. *See Mertens v.*

Hewitt Assocs., 113 S. Ct. at 2071. Thus, a person is a fiduciary with respect to a plan to the extent he performs one of the following functions that gives rise to fiduciary status under § 3(21)(A): 1) exercising discretionary authority or control over plan administration or management; 2) exercising any authority or control respecting management or disposition of plan assets; or 3) rendering investment advice for a fee regarding plan assets.

While fiduciary status is broadly defined in ERISA, the definition is not unlimited. Section 3(21)(A) also provides that a person is a fiduciary only "to the extent" of the fiduciary function performed. Courts have consistently interpreted this limitation as meaning that fiduciary status under ERISA is not "an all-or-nothing concept". *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1051 (1993). *See also Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1498 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1099 (1995); *Belade v. ITT Corp.*, 909 F.2d 736, 738 (2d Cir. 1990).

Thus, it is entirely possible -- and extremely common in the case of employers that sponsor single-employer plans -- for an employer to act both in fiduciary and non-fiduciary capacities with respect to the same plan. Many employers choose, for reasons of cost and administrative efficiency, among others, to perform the fiduciary function of discretionary administration of some or all of the plans they sponsor. Indeed, ERISA expressly contemplates that employers and their officials may act in fiduciary capacities

with respect to employee benefit plans. *See* ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3).

The courts have also consistently recognized that certain decisions made by employers are not subject to fiduciary standards even if these decisions have direct and significant impacts on employee benefit plans. In *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1228 (1995), the Court recognized this principle by stating that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans," and quoting from *Adams v. Avondale Industries, Inc.*, 906 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990) for the proposition that "a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefit plan." Similarly, the circuit courts have uniformly recognized a category of "plan design" decisions -- *i.e.*, decisions to establish, terminate, or amend employee benefit plans -- which are "business" or "settlor" decisions that an employer is free to make in its own interests without being subject to ERISA's fiduciary standards. *See, e.g., McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 670-71 (7th Cir. 1993); *United Paperworkers Int'l Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384, 1386 (8th Cir. 1992). Employers that act in fiduciary capacities with respect to employee benefit plans are characterized as wearing "two hats": one in carrying out business activities which do not fall within one of the fiduciary functions defined in § 3(21)(A) and to which ERISA's fiduciary standards do not apply, and the other in carrying out a fiduciary function, typically plan administration, to which fiduciary duties fully apply. *See, e.g., Joseph*

Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan, 3 F.3d 994, 1001-02 (7th Cir. 1993) (collecting cases), *aff'd on other grounds*, 115 S. Ct. 981 (1995).

The Court of Appeals in this case recognized the general applicability of these principles and observed that:

> It is true that not every business decision made by a fiduciary will subject it to liability for breach of fiduciary duty. . . . Defendants' decision to create MCC and to transfer certain assets to it, for example, was not by itself a violation of ERISA. It may have been unwise or bad business, but that is not the same thing as a breach of fiduciary duty.

(App. 12a-13a.) The court stated, however, that the communications by petitioner to its employees that formed the basis of the breach of fiduciary duty claim were not "mere business decisions on the part of defendants." (App. 13a.) Apparently having concluded by that statement that petitioner's communications to employees were made in a fiduciary capacity, the Court of Appeals also concluded that the communications constituted a breach of fiduciary duty.

The principal authority cited by the Court of Appeals in connection with its conclusion that petitioner's communications were made in a fiduciary capacity was *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988). *Berlin* was the first in a line of circuit court decisions which, like the decision in this case, held that employers that also act as plan administrators have fiduciary duties to disclose to participants information about potential changes in employee

benefit plans.[7] All of these cases were brought by former employees who terminated employment before some significant improvement in the benefits under their employee benefit plans for which they could have been eligible if they had not terminated employment. Their common allegation was that the employer had breached a fiduciary duty by failing to disclose to employees the possible improvement in benefits. The courts that have recognized such a claim have stated that, although an employer need not generally disclose its internal deliberations and is not held to a "duty of clairvoyance" in predicting future changes, the employer breaches a fiduciary duty if it fails to disclose, at least in response to employee inquiries, such prospective changes when they are under "serious consideration." *See Berlin*, 858 F.2d at 1163; *Fischer*, 994 F.2d at 135.

There is no question that an employer which acts as a plan administrator is subject to fiduciary duties while acting in that capacity. Fiduciary duties in plan administration, however, require only that the fiduciary administer the plan pursuant to its current terms. As this Court recently observed in *Curtiss-Wright*, 115 S. Ct. at 1230, one of

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[7] *See also Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994); *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993); *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2416 (1993). Other appellate decisions, however, have rejected the proposition that an employer has a fiduciary duty to disclose future plan changes. *See Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991); *Young v. Standard Oil*, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988).

ERISA's "core functional requirements" is found in § 402(a)(1), 29 U.S.C. § 1102(a)(1), which requires that every employee benefit plan be "established and maintained pursuant to a written instrument." Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), imposes on fiduciaries the duty to act in accordance with the lawful terms of that instrument and other current governing documents. Similarly, the statutory disclosure requirements imposed on the plan "administrator", a term defined in § 3(16)(A), 29 U.S.C. § 1002(16)(A), require disclosure of the current terms of the plan.[8] Notably absent from these provisions is any requirement for disclosure of plan changes that have not yet been implemented, much less of potential changes that are merely under consideration.

Moreover, as discussed above, an employer, regardless of whether it also acts as plan administrator, is not subject to ERISA's fiduciary duties in making decisions about future plan terms. If, as the case law consistently holds, a corporate plan sponsor is entitled to make plan

[8] Thus, provisions of part 1 of Title I of ERISA require that the administrator furnish to participants and beneficiaries, both initially and at five-year intervals, an understandable summary of the plan's current terms. *See* §§ 102(a), 104(b)(1), 29 U.S.C. §§ 1022(a), 1024(b)(1). Participants must also receive, within prescribed time periods, summaries of any material modifications to these terms. *See* § 104(b)(1), 29 U.S.C. § 1024(b)(1). In addition, a plan administrator is required, at the risk of incurring penalties, to make available for inspection by participants and beneficiaries the full text of the plan's current governing documents and to furnish copies of these documents on request. *See* §§ 104(b)(2), (4), 502(c), 29 U.S.C. §§ 1024(b)(2), (4), 1132(c).

design decisions entirely in its own interest and without regard to ERISA's fiduciary standards, then there is no reason why an ERISA fiduciary duty should attach to require disclosure of corporate consideration of these decisions.

In holding that petitioner was subject to ERISA's fiduciary standards in communicating to employees about future changes that could affect their employee benefits, the Court of Appeals blurred the clear line drawn by the case law between an employer's fiduciary and non-fiduciary functions with respect to a plan. Because ERISA defines fiduciary status in functional terms, a determination of whether petitioner was acting in a fiduciary capacity can only be made by examining the communications at issue in this case. The Court of Appeals' opinion reflects that Varity decided to transfer unprofitable business operations to a newly-formed subsidiary. (App. 2a-3a.) In order to induce employees who worked in these business operations to transfer to the new subsidiary, Varity made representations to the employees, *e.g.*, that "the new company had a bright future," that it knew were inaccurate. (App. 3a.) Varity communicated only "very limited" information regarding employee benefits, including a chart showing that the benefits offered by the old and new employers would be identical and a statement that "benefit programs will remain unchanged" as a result of the transfer. (App. 4a.) In addition, Varity officials did not include in question and answer sheets distributed to employees any information about "certain questions that they knew the employees wanted answered" relating to eligibility for severance and early retirement benefits from the old employer. *Id.* Varity also

did not repeat its previous disclosure that it had reserved the right to modify or terminate benefits in the future.

Whatever other characterization is made of Varity's communications, they were not made in the course of plan administration. Rather, they all derived from Varity's role as an employer communicating with employees about its restructuring of business operations and attempting to induce employees to transfer their employment to the new subsidiary. The fact that Varity also administered its ERISA plans was fortuitous and should have been irrelevant to the court's legal analysis. If Varity's employee benefit plans had been administered by an entirely unrelated entity, that entity presumably would not have known of Varity's future expectations and could not have disclosed them or breached a duty by failing to disclose them. Varity, on the other hand, would likely still have made the same types of employee communications in order to serve its perception of its corporate interests as reflected in the court's opinion.[9]

In addition to its citation to *Berlin,* the Court of Appeals cited to two other decisions holding that ERISA fiduciaries owe duties of disclosure to individual plan

[9] Indeed, Varity's communications essentially related to the business prospects of its new subsidiary and were even further removed from plan administration than the communications at issue in *Berlin* and similar cases involving disclosure of future plan changes. According to the Court of Appeals' opinion, Varity was not so much anticipating future changes in its employee benefit plans as it was anticipating that the new subsidiary would fail, one consequence of which would be an inability to continue employee benefits.

beneficiaries, *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981), and *Eddy v. Colonial Life Insurance Co. of America*, 919 F.2d 747 (D.C. Cir. 1990). Both *Rosen* and *Eddy*, however, were suits against defendants -- respectively, a board of plan trustees and an insurer acting as a discretionary plan administrator -- that were unquestionably acting in fiduciary capacities in dealing with plan beneficiaries. Both decisions invoked the trust law principle that a fiduciary owes disclosure duties to a beneficiary regarding matters relevant to the fiduciary-beneficiary relationship. *See Rosen*, 637 F.2d at 600 n.11 (quoting Restatement (Second) of Trusts § 173 (1959)); *Eddy*, 919 F.2d at 750-51 (same).[10] This case, in contrast, involves disclosures arising from an employer-employee relationship, a relationship not, as such, subject to ERISA's fiduciary standards.

The Court of Appeals also expressed its desire to provide some remedy for respondents. As discussed *supra* at 13-14, this desire alone is insufficient reason to depart from ERISA's statutory scheme, and, in any event, other grounds for a remedy have also been asserted in this case.

[10] Because this case can and should be resolved by holding that Varity did not act as a fiduciary when communicating with its employees, this Court need not decide whether those who are communicating in a fiduciary status should be held to standards beyond those expressly imposed by part 1 of Title I of ERISA. In *Curtiss-Wright*, the Court distinguished the "thorough" disclosure scheme contained in part 1 from the fiduciary responsibility provisions contained in part 4 and observed that "we do not think Congress intended it to be supplemented by a far-away provision in another part of the statute." 115 S. Ct. at 1231.

Moreover, the disclosure duty mandated by the Court of Appeals in this case and articulated more fully in decisions such as *Berlin* and *Fischer* would be likely to prove simultaneously unworkable for employers and unhelpful to employees in general.

While the Court of Appeals found it unnecessary, in light of the facts of this case, to discuss in any detail the scope of required disclosures, the line of cases emanating from *Berlin*, the principal authority relied on by the Court of Appeals, holds that potential plan changes must be disclosed once they are under "serious consideration" by the plan sponsor. *Berlin*, 858 F.2d at 1164. It is no accident that these disclosure issues have arisen most frequently in recent years at companies that have implemented early retirement or "window" plans that provide employees with enhanced retirement or severance benefits if they retire during a specified "window" period. *See id.* at 1157; *Fischer,* 994 F.2d at 132; *Mullins*, 23 F.3d at 665; *Drennan*, 977 F.2d at 248-49. Typically, these plans are adopted by companies that want to "downsize" or reduce the number of their employees. Adoption of enhanced benefit plans allows these companies to avoid layoffs and to reduce their workforce in a way that is simultaneously beneficial to the departing employees and protective of the companies' interests in avoiding or minimizing litigation over the terminations and maintaining the morale of the remaining workforce by showing that the company treats departing employees well.

Nothing in ERISA, of course, requires plan sponsors to adopt such enhanced benefits, and the financial circumstances of employers, including their ability to afford

enhanced benefits, varies from one employer to the next and can change rapidly even for a given employer. Thus, companies may give "serious consideration" to a wide range of alternatives that may, in different ways, affect employee benefits, including outright layoffs, divestitures, window plans, and continuation of the status quo. Disclosure of such a broad and general range of alternatives is unlikely to prove helpful in any respect to participants.

The more narrowly the companies' options are focused, the more helpful disclosure of those options could be to participants, at least if they have any ability to make benefit choices that could be affected if a particular option were pursued. Yet, until a decision is actively made and implemented, there is no assurance as to what option will be chosen, and employees could well be making choices based on disclosures that turned out, in retrospect, to be accurate but misleading. For example, a company could disclose its anticipated establishment of a window plan only to have its financial situation deteriorate so that layoffs became the only viable alternative; employees who had remained employed in anticipation of an enhanced benefit would not have benefited from the premature disclosure, especially if they had foregone benefit choices that were no longer available to them.

Moreover, the rationale adopted by the Court of Appeals is not limited to disclosure of major plan changes, such as the window plans at issue in *Berlin* and similar cases. Employers frequently amend their medical plans by adding, deleting or modifying provisions for coverage of particular medical treatments. A plan participant or benefi-

ciary disadvantaged by such an amendment -- or one who would have benefited from such an amendment if it had been implemented earlier -- could, under the Court of Appeals' decision, always sue to obtain the more favorable coverage on the theory that it was a breach of fiduciary duty not to disclose prior "serious consideration" of the amendment.

While disclosure of potential benefit changes may or may not prove helpful to employees, it would certainly intrude on an employer's ability to manage its business operations consistently with the corporate fiduciary duties owed to its shareholders. Employers have numerous reasons not to make premature disclosure of matters relating to their future business activities, including maintaining secrecy from competitors and avoiding disruption of their workforce by announcing possible developments that may never come to pass.

In short, a rule requiring disclosure of every corporate alternative affecting benefit plans that was under "serious consideration" would prove unworkable and would promote more litigation than it avoided or resolved. More importantly, it is not the rule that Congress envisioned in enacting ERISA's fiduciary and disclosure provisions. Rather, ERISA contemplated that fiduciary and disclosure duties attach to administration of a plan but not to matters involving possible changes to, or indirect effects on, the plan. Because the Court of Appeals' decision imposes fiduciary status and duties on employers well beyond the bounds intended by the statute, it is in error and should be reversed by this Court.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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In the
SUPREME COURT of the UNITED STATES
October Term, 1994

No. 94-1471

Varity Corporation,
Petitioners,

v.

Charles Howe, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AS AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association ("NELA") is a voluntary organization started in 1985 of over 2,000 attorneys who specialize in representing individuals in controversies arising from the workplace. It is the country's only professional membership organization of lawyers who represent employees in employee benefits, employment discrimination, wrongful discharge and other

employment-related cases.

NELA has devoted itself to supporting precedent-setting litigation and legislation affecting the rights of individuals in the workplace. NELA has an interest in the application of the Employee Retirement Income Security Act ("ERISA") because the clients of NELA members frequently have employee benefit claims. NELA is qualified to brief this Court on the implications of its decision in this case, having participated as amicus curiae in numerous other cases involving ERISA and other employment laws, including *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 114 S.Ct. 517 (1993), and the leading decision on ERISA benefit claims, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

STATEMENT

This case started when Varity Corporation ("Varity" or "the Company") transferred the farm combine equipment operations in its Massey-Ferguson subsidiary to a new company called Massey Combines Corporation ("MCC"). In its Petition for Certiorari, the Company virtually admits it chose a course of action that would likely result in the termination of all benefits for the employees who wound up in the new company. Pet. for Cert. at 18.

The District Court found, as Varity also nearly conceded in its Petition, that Varity misrepresented information about benefits with the new company to plan participants to induce them to consent to transfers to the new company. *Id.* The Company told the employees that "benefit programs will remain unchanged" and offered a side-by-side comparison showing identical health benefits

with the new company. Varity told the employees the new company had a "bright future" even though Varity knew it was "essentially bankrupt." 36 F.3d at 749. Varity deliberately did not tell employees about the power to terminate or amend the benefits that the new company possessed if "necessary," a power the new company was virtually certain to exercise because of Varity's acts. *Id.*

Two years later, MCC collapsed and was placed in receivership. Health benefits for retirees and former employees stopped entirely. The District Judge who heard the evidence called Varity's scheme "a sucker punch on loyal employees who had given a lifetime of service." The Eighth Circuit awarded the retirees approximately $700,000 in lost past-due benefits as restitution and ordered that they be returned to the Massey-Ferguson plans which Varity had induced them to leave. The relief was limited to those persons who had retired before the receivership and would have been Massey-Ferguson retirees if Varity had not induced their transfer to MCC.

SUMMARY OF ARGUMENT

ERISA's plain language and Congress' intent warrant protection of participants' reasonable benefit expectations, not their remediless betrayal. The Eighth Circuit's decision follows the plain language of ERISA Section 502(a)(3) and is consistent with ERISA's intent in protecting participants from misrepresentations. Varity does not merit legal insulation for misrepresentations that induced participants and beneficiaries to give up retiree health coverage with Massey-Ferguson in exchange for worthless benefit coverage with a company that was

virtually bankrupt at its inception.

A fiduciary such as Varity has a duty to tell participants the truth. Even if it has no duty as a corporation to tell participants about internal corporate plans, it cannot, as a plan administrator and fiduciary, "cast a blind eye" while participants are induced to give up their health benefits by affirmative misrepresentations about benefits and the ability of a new company to sustain them without change. The participants and beneficiaries who were deprived of retiree health benefits by Varity's misrepresentations deserve appropriate equitable relief.

ARGUMENT

I. ERISA Section 502(a)(3) Offers a Cause of Action to Participants Who Are Harmed by a Breach of Fiduciary Duty

The language of ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes suits by participants or beneficiaries to redress acts that violate "any provision of this title." ERISA Section 502(a)(3) is contained in title I, as is ERISA Section 404, 29 U.S.C. § 1104. Consequently, "any provision of this title" includes the fiduciary duties in ERISA Section 404. To redress such violations, ERISA Section 502(a)(3) offers "appropriate equitable relief" to participants and beneficiaries.

The existence of an ERISA Section 502(a)(3) cause of action may be analyzed in three steps:

A. Are the plaintiffs "participants or beneficiaries" who may sue under ERISA Section 502(a)(3)?

B. Is a breach of fiduciary duty a violation of "any provision of this title" that participants may sue to relieve under Section 502(a)(3)?

C. May the participants and beneficiaries who are harmed by a breach of fiduciary duty obtain appropriate equitable relief under Section 502(a)(3) for the violation?

A. The Plaintiffs Are Participants and Beneficiaries

The answer to the first question is undisputed: The plaintiffs are participants and beneficiaries who may sue under ERISA Section 502(a)(3). Every circuit recognizes that an individual participant has standing to bring suit under Section 502(a)(3).

B. A Fiduciary's Breach of Duty Violates Title I of ERISA

The answer to the second question is also clear. "[T]his title" refers to title I of ERISA, the title in which ERISA Section 502(a)(3) is found. ERISA Section 404 is a provision in Part 4 of Title I. Therefore, ERISA Section 404's fiduciary duties are a "provision of this title" that participants may sue to enforce under Section 502(a)(3).

One of a fiduciary's most fundamental duties is not to deceive the beneficiaries. Black-letter trust law establishes, moreover, that "[a] beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by [a fiduc-

iary's] silence as well as by the spoken word." *Globe Woolen Co. v. Utica Gas & Electric Co.*, 224 N.Y. 483, 489, 121 N.E. 378, 380 (1918) (Cardozo, J.).

Each circuit that has addressed the question holds that a fiduciary's misrepresentation to a participant or beneficiary is a breach of fiduciary duty under ERISA. As the Eighth Circuit held here, quoting *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988), "a fiduciary may not materially mislead those to whom the duties of loyalty and prudence in 29 U.S.C. §1104 are owed." 36 F.3d at 754. *See Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994); *In re Unisys Corp. Retiree Med. Ben. "ERISA" Litig.*, ___ F.3d ___, 1995 U.S. App. LEXIS 15921, *15 (3d Cir. June 28, 1995); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 986 (3d Cir. 1995); *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130, 133-35 (3d Cir.), *cert. denied*, 114 S.Ct. 622 (1993); *Berlin v. Mich. Bell Tel. Co., supra*; *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2416 (1993); *Anweiler v. American Elec. Power Service Corp.*, 3 F.3d 986, 991 (7th Cir. 1993); *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399 (8th Cir. 1995); *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984); *Maez v. Mountain States Tel.*, 54 F.3d 1488, 1995 U.S. App. LEXIS 9155, *32 (10th Cir. 1995); *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747,

750 (D.C. Cir. 1990).[1]

C. ERISA Section 502(a)(3) Offers Participants and Beneficiaries Appropriate Equitable Relief for a Breach of Fiduciary Duty

The answer to the third question should also be clear. Section 502(a)(3) offers injunctive and other "appropriate equitable relief" to participants and beneficiaries who sue to obtain relief for a violation of "this title." As discussed above, "this title" includes the fiduciary duty provisions in title I of ERISA. In *Mertens v. Hewitt Associates*, 113 S.Ct. 2063, 2069 (1993), this Court held that ERISA Section 502(a)(3)'s appropriate equitable relief includes restitution, as well as injunctive relief. In this case, the Eighth Circuit ordered restitution and injunctive relief.

Varity nonetheless argues that the relief the Eighth Circuit granted is, while concededly equitable, unavailable to the participants or beneficiaries because only plan-based relief may be offered under Section 502(a)(3) for a breach of fiduciary duty. In this fashion, the Company unabashedly petitions this Court to protect it from responsibility "even" if it "misrepresents ... information" to plan partici-

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[1] In its Petition for Certiorari, Petitioner suggested a dispute about whether misrepresentations by a fiduciary are a breach of duty when none of ERISA's specific disclosure rules are violated. Pet. for Cert. at 22-23. It later conceded that issue, Reply Pet. at 3, and now argues that the misrepresentations at issue were not made in its fiduciary capacities. NELA addresses this argument below.

pants and beneficiaries. Pet. for Cert. at 18; *id.* at 16.[2]

While Varity maintains the Eighth Circuit reads ERISA Section 502(a)(3) "in isolation from the full context of Part 4 of ERISA," Br. of Pet. at 28-29, presumably it would not contend that remedies for violating all sections in Part 4 of Title I run only to the plan. For example, it would be nonsensical for relief for a violation of the statute's rules on plan documents and amendments in ERISA Section 402, 29 U.S.C. § 1102, at issue in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995), to run only to the plan. If so, a participant unlawfully deprived of benefits by violations of these sections could not obtain an injunction and other appropriate equitable relief in his or her favor. Thus, the Company's argument could not extend to all of Part 4 of ERISA. ERISA Section 404 would have to be *sui generis*.

If the Company's effort to change federal law were adopted, Section 502(a)(3) would effectively be rewritten to offer "appropriate equitable relief" for violation of "any provision of this title, *except Section 404's fiduciary responsibility provision in which case relief shall only be to the plan*." This alteration would create a gaping hole in "appropriate equitable relief" that neither Section 502(a)(3) nor *Mertens* expresses. Injunctive and other "appropriate equitable

[2] It is difficult to overlook that Varity advances these arguments through a well-known free speech attorney: With these arguments, Varity ironically seeks greater insulation from responsibility for misrepresentations about employee benefits under ERISA than the press possesses for its speech under the First Amendment.

relief" would somehow not offer equitable relief to the participants and beneficiaries who are harmed by a fiduciary's misrepresentations.

Varity and its amici argue, in essence that Congress inadvertently left out language limiting Section 502(a)(3)'s relief for a breach of fiduciary duty to relief running to the plan. However, as this Court stated in *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985):

> "The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' [citation omitted]."

When Congress meant to limit relief to the plan, it did so. Thus, Section 409 includes in two places the limiting words "to such plan," which Varity now seeks to place in Section 502(a)(3). See *Russell*, *supra*. Just as the absence of authorization of remedies beyond those enumerated provides "strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly," *Russell*, 473 U.S. at 146, so the absence of limiting language in Section 502(a)(3) that is present in Section 409 provides strong evidence that no limitation such as that proposed by the Petitioner was intended.[3]

[3] In two other places in the civil enforcement provisions, Congress demonstrated that it knew how to limit enforcement provisions to specific sections of title I. In Section 501, criminal penalties are applied only to violations of Part I of ERISA. In

An exception that restricts equitable relief for a breach of fiduciary duty to the "plan" is also inconsistent with the plain language of ERISA Section 404. Under ERISA Section 404, a fiduciary must discharge its duties "solely in the interest of the *participants and beneficiaries*" and "for the exclusive purpose of providing benefits to participants and their beneficiaries." It makes little sense to say that the relief for violations of duties owed to "participants and beneficiaries" may only go to the plan.

What purpose would Congress have had to strike the "balance" the Petitioner advances: To deny participants and beneficiaries equitable relief for the harm a fiduciary's misrepresentations cause? The unambiguous language of ERISA and its extensive legislative history suggest exactly the opposite Congressional purpose. ERISA was enacted, by nearly unanimous votes in both Houses, as remedial legislation to protect employees' and retirees' "anticipated" benefits. ERISA Section 2, 29 U.S.C. § 1001. ERISA is designed to protect the interests of employees and their beneficiaries in pension and welfare plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). ERISA was, by no stretch of the imagination, enacted to protect companies who engage in misrepresentations as part of a scheme to defeat anticipated benefits. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989), this Court recognized

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Section 502(a)(5), certain restrictions are placed on the Secretary of Labor's ability to enforce Parts 2 and 3 of Title I. By contrast, ERISA Section 502(a)(3) does not limit the enforcement of ERISA's fiduciary duties by participants and beneficiaries, except that the relief must be injunctive or other appropriate equitable relief.

that Firestone's "reading of ERISA would require us to impose a standard ... that would afford participants less protection than they enjoyed before ERISA was enacted."

Following *Bruch* and this Court's decision in *Mertens v. Hewitt Associates*, Petitioner pays lip service to ERISA's primary goal of benefitting employees, but emphasizes a purported subsidiary goal of containing benefit costs. Br. of Pet. at 33-38. Apart from whether Congress adopted such a subsidiary goal, or merely considered costs in relation to particular rules (e.g., deciding not to impose minimum statutory standards on the vesting of early retirement), the support Petitioner finds in this subsidiary goal in this case is perplexing: Is Petitioner seriously contending Congress intended to give employers a free ticket to misrepresent plan benefits to participants and beneficiaries in order to contain benefit costs?

In offering relief to the plan's participants for a breach of fiduciary duty, the plain language of ERISA Sections 502(a)(3) and 404 follows the common law of trusts. As Justice Brennan stated in his concurrence in *Mass. Mutual Life Ins. Co. v. Russell, supra*, 473 U.S. at 152-53 (1985), "fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits." "Similarly fundamental in the law of trusts is the principle that 'courts will give to beneficiaries the remedies necessary for the protection of their interests.'" *Bixler v. Central Pa. Teamsters Health & Wel. Fund*, 12 F.3d 1292, 1299 (3d Cir.), *cert. denied*, 113 S.Ct. 61 (1993) (quoting Justice Brennan's concurrence in *Russell* and Austin W. Scott, *Law of Trusts* § 199 at 1638 (1967)). *See also Restatement (Second) of Trusts* § 205, comment i (1959)

(axiom of trust law is that a trustee will not be permitted to benefit from his own breach).

ERISA Section 502(a)(3) completes ERISA's enforcement scheme by authorizing courts to develop appropriate equitable remedies to protect participants and beneficiaries. In *Mertens v. Hewitt Associates*, *supra*, 113 S.Ct. at 2069, this Court held that Section 502(a)(3)'s authorization of appropriate equitable relief offers at least traditional equitable relief, including injunctive relief and restitution. In *Ingersoll Rand Co. v. McClendon*, 498 U.S. 133 (1990), this Court also stated that the equitable relief available at state law is "well within the power" of federal courts to provide under ERISA Section 502(a)(3). In *Mitchell v. DeMain Jewelry*, 361 U.S. 288 (1960), this Court further held:

> "Unless a statute in so many words, or by a necessary and inescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.... When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."

361 U.S. at 291-92 (citations omitted).

The Third, Seventh, Eighth and District of Columbia Circuits hold that equitable relief may be granted to an

individual who is harmed by a breach of fiduciary duty. *In re Unisys Corp. Retiree Med. Ben. "ERISA" Litig.*, *supra*, 1995 U.S. App. LEXIS at 15921 *30-37; *Bixler v. Central Pa. Teamsters Health & Wel. Fund*, *supra*, 12 F.3d at 1299-1300 (equitable relief is available to individual under Section 502(a)(3) for misleading information); *Anweiler v. American Elec. Power Service Corp.*, *supra*, 3 F.3d at 993 (equitable relief may be granted to individual participant under Section 502(a)(3) for breach of fiduciary duty in failing to disclose that reimbursement agreement was voluntary); *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 230 (7th Cir. 1990) (ERISA Section 502(a)(3) may impose liability on a fiduciary that runs directly to the beneficiary); *Howe v. Varity Corp.*, *supra*, 36 F.3d at 754-55 (rejecting employer's argument that Section 502(a)(3) claims can only be brought on behalf of a plan and cannot inure to the participants' benefit; participants cannot collect monetary damages as such, but they may obtain full range of individual equitable relief, including restitution); *Eddy v. Colonial Life*, *supra*, 919 F.2d at 750. *See also Corcoran v. United Health Care, Inc.*, 965 F.2d 1321, 1336 (5th Cir.), *cert. denied*, 113 S.Ct. 812 (1992) (acknowledging that Section 502(a)(3) offers equitable relief to participants for fiduciary breaches).

The Ninth Circuit is the only circuit that seems to support the position that participants and beneficiaries may not receive appropriate equitable relief under ERISA Section 502(a)(3) for a breach of fiduciary duty. *See McLeod v. Oregon Lithoprint Inc.*, 46 F.3d 956 (9th Cir. 1995); *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412 (9th Cir. 1991). But a careful reading of these cases shows that in neither did the participants and beneficiaries seek

equitable relief for misrepresentations; instead, they sought compensatory damages (*McLeod*) or benefits due if discretionary authority were exercised in their favor (*Horan*). The Ninth Circuit has also failed to reconcile *McLeod* and *Horan* with a case holding it is a breach of fiduciary duty for a fiduciary to misrepresent benefits. *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404 (9th Cir. 1989).

In other cases where the relief sought is equitable, the Ninth Circuit has allowed participants to obtain relief for a breach of fiduciary responsibilities under ERISA Sections 502(a)(3) and 409. It requires that a company like Varity make restitution to the plan for the breach of fiduciary duty and orders that participants be paid under a constructive trust. *See ACTWU v. Murdock*, 861 F.2d 1406, 1416-17 (9th Cir. 1988); *Waller v. Blue Cross of Cal.*, 32 F.3d 1337 (9th Cir. 1994).[4]

Varity nevertheless invokes the well-known interpretive principle that "the specific governs over the general." Br. of Pet. at 21-22. Varity argues that Congress could not have meant ERISA Section 502(a)(3) to be used to challenge a violation of fiduciary duties on behalf of participants, as opposed to the plan, since ERISA Section

[4] *See* S. Rep. No. 383, 93d Cong., 2d Sess. 105-06, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4989, and I ERISA Leg. Hist. 1063, 1173 ("constructive trust may be imposed on the plan assets to protect the participants and beneficiaries"); *Anweiler v. American Electric Power Serv. Corp.*, *supra*, 3 F.3d at 992-93; *Iwans v. Aetna Life Ins. Corp.*, 855 F. Supp. 579 (D. Conn. 1994).

502(a)(2), 29 U.S.C. § 1132(a)(2), addresses fiduciary duties and provides remedies only for the plan.

Varity's interpretive principle is, however, used in cases in which one reading of a general statutory provision would control or nullify a specific statutory rule. Usually, the general provision is removed in time of adoption or statutory location from the specific rule. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 549 (1974). Here, the Eighth Circuit's reading of the simultaneously enacted, directly adjacent Section 502(a)(3) does not, except in Varity's mind, control or nullify Section 502(a)(2). It leaves Section 502(a)(2) "as is" and complements it with remedies offered by the plain language of Section 502(a)(3).

More specifically, ERISA Section 502(a)(2) offers "appropriate relief under [ERISA] Section 409," 29 U.S.C. § 1109. Section 409 imposes personal liability on fiduciaries to "make good to [the] plan any losses to the plan" resulting from the breach and to "restore to [the] plan any profits" the fiduciaries have made through use of plan assets. In *Russell*, this Court interpreted the concluding clause in Section 409 offering "such other equitable or remedial relief as the court may deem appropriate" as offering relief to the "plan" in this context. 473 U.S. at 140-42.

Yet, there are unquestionably breaches of fiduciary duty, especially involving misrepresentations and nondisclosure, that impact not the plan as a whole, but individuals or groups of participants and beneficiaries. Such breaches cause the participants or beneficiaries (not the plan as a whole) to incur losses, and may not yield direct profits to

fiduciaries like Varity from use of plan assets (but rather reduce benefit obligations). It is those breaches that Section 502(a)(3) addresses. The two sections thus have separate, complementary functions: Section 502(a)(2) protects the pian; Section 502(a)(3) protects participants and beneficiaries.[5]

Varity's argument depends on viewing ERISA Section 409 as barring the door to any other relief for breaches of fiduciary duty. It is only if this prohibitive construction is accepted that ERISA Section 502(a)(2) can be viewed as controlled or nullified by ERISA Section 502(a)(3). NELA's review of ERISA's legislative history finds no direct or indirect support for Petitioner's argument that "ERISA's legislative history confirms that the remedies ultimately placed in § 409 were meant to cover all actions for breach of fiduciary duty." Br. of Pet. at 26. While practically every ERISA bill made fiduciaries liable to "make good to such plan losses to the plan," as Petitioner asserts, the civil enforcement sections of ERISA were never so limited. For example, the bill the Senate Labor Committee reported offered "appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation or duty of a fiduciary." S.4 (as reported), 93d Cong., 1st Sess. § 603, *reprinted in* I ERISA Leg. Hist. at 579; *see* S.1179 (as reported by the Senate Finance

[5] Remedies under ERISA Section 502(a)(2) include monetary damages for losses to the plan. Thus, the remedies to the plan are broader than the equitable remedies offered participants and beneficiaries under ERISA Section 502(a)(3). *Mertens*, 115 S.Ct. at 2067.

Committee), 93d Cong., 1st Sess. § 501(d)(1), *reprinted in* I ERISA Leg. Hist. at 950 ("to redress or prevent any violation").

The Conference Committee's restoration of language to the civil enforcement section offering "appropriate equitable relief" for violations of this title, in addition to injunctive relief, must be seen in this light as a considered completion of ERISA's carefully-crafted enforcement scheme. *See also* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5107, and III ERISA Leg. Hist. 4277, 4594 ("[u]nder the conference agreement, civil actions may be brought by a participant or beneficiary ... for relief from breach of fiduciary responsibility"); 120 Cong. Rec. S-15737 (Aug. 22, 1974), *reprinted in* III ERISA Leg. Hist. 4743 (statement of Senator Harrison Williams, principal Senate sponsor with Senator Jacob Javits: "objectives of these provisions" are "to make applicable the law of trusts ... and to provide effective remedies for breaches of trust").[6]

In *Russell*, *Mertens* and other decisions on ERISA,

[6] Petitioner's suggestion that a change by the Conference Committee is not intended to mean what it states because it "first appeared only in the statute as reported out of the Joint Conference Committee" is remarkable. Br. of Pet. at 26-27. When Congress deletes limiting language prior to enactment that was included in an earlier version of the bill, the limitation is presumed not to be intended. *Russello v. United States*, 464 U.S. 16, 23-24 (1983). The standard for overcoming this presumption should be especially high when the Conference Committee is responsible for the change.

this Court has emphasized that Congress carefully crafted ERISA's relief provisions. Consequently, as discussed above, the Court has been unwilling to infer remedies that Congress did not express in so many words. *See, e.g., Russell, supra*, 473 U.S. at 147. It should be even more unwilling to read out remedies that Congress plainly offered to participants and beneficiaries.

While the raison d'etre of the fiduciary provisions is indisputably to protect participants as well as the plan as an entity, the argument Varity and its amici advance would read all fiduciary duties owed to participants out of ERISA. Advancing this argument as the proper interpretation of a remedial statute like ERISA is illogical and harmful to those the statute is to protect. The plain language and function of ERISA Section 502(a)(3) is to "enjoin any act or practice" that violates Title I of ERISA, including breaches of fiduciary duties, and to offer other appropriate equitable relief for the violation. This Court has already held in *Mertens* that "appropriate equitable relief" under this Section includes restitution, as well as injunctive relief.

II. The Remaining Issues Are Narrower, Fact-Based Issues on Which the Eighth Circuit Should Be Affirmed

The answers to the questions discussed above are clear. As a result, Petitioner Varity is left with a narrower, fact-based argument that questions:

- Whether the Company acted as a fiduciary when it made the misrepresentations.

Additionally, amicus U.S. Chamber of Commerce questions

on the Company's behalf:

- Whether the Eighth Circuit's order of restitution is appropriate in the circumstances of this case. (The Chamber of Commerce does not challenge the injunctive order.)

Each of these arguments lacks merit.

A. Varity Violated Its Fiduciary Responsibilities in This Case

Petitioner conceded in its Reply Brief in support of certiorari that the issue is not whether an ERISA fiduciary must communicate complete and accurate material information to plan beneficiaries. Reply Pet. for Cert. at 3. Petitioner narrowed the issue to whether Varity acted in a fiduciary capacity when it communicated information about internal business decisions that might affect the future provision of benefits. Petitioner concedes, as it must, that Varity was a plan administrator and fiduciary. It merely contends that at the moments when it made misrepresentations about benefits, it was speaking solely as a corporation, and not in any respect as a fiduciary.

As discussed further below, case law supports the Eighth Circuit's determination that Varity breached its fiduciary duty by both misrepresenting the new plan's benefits and not informing participants of the misrepresentations. We first appreciate that the Eighth Circuit's analysis is more discerning than Varity describes. Petitioner describes the issue as whether the failure to disclose its internal assessment of MCC's business prospects constituted misleading communications about plan administration.

Varity next states ERISA was not meant to require a company to furnish its internal views of the likelihood of success of a business to employees. Pet. for Cert. at 23. However, the Petitioner nearly overlooks that the Eighth Circuit agreed with the Company on this score and held there was no fiduciary duty for Varity to disclose its internal assessment of MCC as such. 36 F.3d at 753.

Instead, the Eighth Circuit held that the fiduciary duty arose when Varity chose to speak about benefits and MCC's prospects. When Varity chose to speak about benefits, describing the benefits as identical and offering a side-by-side comparison of benefits, along with MCC's prospects, it had a fiduciary duty to tell the plan's beneficiaries the truth. 36 F.3d at 753-54. The Eighth Circuit also held to the extent Varity made its misrepresentations in a non-fiduciary capacity, Varity had an affirmative duty as the plan administrator/fiduciary to inform beneficiaries of its knowledge of those misrepresentations before the beneficiaries plunged on a ruinous course. 36 F.3d at 754 (following *Eddy v. Colonial Life Ins. Co.*, *supra*).

A trust law analogy that tracks the facts in this case illuminates this issue. Assume Varity, in addition to running a business, administers a trust for its employees that offers health benefits in retirement. The trust is not pre-funded but has a reliable source of funding under the plan instruments, namely, Varity's corporate assets. Varity creates a new company with a superficially identical trust but no assets from which to draw to fund the benefits. Benefits under the second trust are conditioned on beneficiaries in the first trust giving up their status as beneficiaries. Varity has a substantial financial interest in a large

number of them giving up their status. Varity also knows the funding for the second trust is non-existent and that the superficially identical benefits will soon be eliminated.

NELA submits it is a fiduciary violation for Varity, which has fiduciary responsibilities, to affirmatively represent to trust beneficiaries that their benefits are identical and "unchanged" and exhort them that the new company with the power to eliminate them has a "bright future," when it knows those statements are false. A second fiduciary violation is for Varity as a fiduciary and plan administrator to let the trust's beneficiaries willingly give up their valuable standing based on such misrepresentations and move to a "ruinous" situation without telling them what it knows. The still more egregious fiduciary violation is for Varity to make such misrepresentations to the plan's beneficiaries for its own financial gain as a corporation without disclosing that it speaks not as a fiduciary but as a company which believes it is not responsible for any misrepresentations it makes.

To argue that these fiduciary violations do not exist because Varity was purportedly not wearing its administrator "hat" at the time it made the misrepresentations is to assume an unproven fact and ignore Varity's duty as a fiduciary to speak up to protect the beneficiaries to whom it owes complete loyalty. A fiduciary cannot lie to beneficiaries for the fiduciary's own financial gain and avoid responsibility by maintaining that it told the lies in its conflicting capacity and had no responsibility as a fiduciary to tell the beneficiaries the truth. The unproven fact, moreover, is that Varity spoke as a non-fiduciary: Varity was undeniably the plan administrator and fiduciary, but it

never told participants it made its side-by-side benefit comparison and representations about benefits in a wholly non-fiduciary capacity, and not in its capacity as the plan's administrator and fiduciary.

When a person who has fiduciary responsibilities functions in a second non-fiduciary capacity, the common law has long required complete and unambiguous disclosure to the trust beneficiaries that the fiduciary's duties may be compromised by the competing interest:

> "[T]he disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance.... Only by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion."

Wendt v. Fischer, 243 N.Y. 439, 443, 154 N.E. 303 (N.Y. 1926) (Cardozo, J.) (realtor with fiduciary duty to sell property on favorable terms breached duty to disclose interest in transaction; equivocal and indefinite disclosure that sale was to a "client of theirs" was not sufficient). *See also Restatement (Second) of Trusts*, § 173 comment d (1959) (trustee has duty to communicate "material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person").

Under ERISA, the First, Second, Third, Sixth and Tenth Circuits have joined the Eighth Circuit in holding that a company that functions in a dual capacity as a plan administrator breaches its fiduciary duties when it makes misrepresentations to ERISA participants about benefits the company has just established under another plan, or

may establish in the future. *Maez v. Mountain States Tel., supra*, 1995 U.S. App. LEXIS at 9155 *33-34; *Mullins v. Pfizer, Inc., supra*, 23 F.3d at 668-69; *Vartanian v. Monsanto Co., supra*, 14 F.3d at 702; *Fischer v. Philadelphia Electric Co., supra*, 994 F.2d at 133-35; *Drennan v. General Motors Corp., supra*, 977 F.2d at 251.[7]

Even if Varity's misrepresentations were made in a wholly non-fiduciary capacity, as it now contends without record support, Varity had a duty as a fiduciary to warn the beneficiaries about what it knew to be misrepresentations. 36 F.3d at 754. The Second, Third, Fourth and District of Columbia Circuits have joined the Eighth in holding that a company that functions as a plan administrator has a duty to inform participants of circumstances that threaten benefits. As a fiduciary, the company cannot stand by silently when it knows of circumstances that threaten the participants' benefits. *Dellacava v. Painters Pension Fund*, 851 F.2d 22, 27 (2d Cir. 1988); *Bixler v. Central Pa. Teamsters Health & Wel. Fund, supra*, 12 F.3d at 1300 (plan administrator has affirmative duty "to speak when it knows that silence might be harmful"); *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 73-74 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989); *Howe v. Varity Corp., supra*, 36 F.3d at 754; *Eddy v. Colonial Life Ins. Co., supra*, 919 F.2d at 750-51.

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[7] The Company suggests misrepresentations have to be about plan terms or administration to be actionable. Br. of Pet. at 31-32, 40. NELA is at a loss to understand how side-by-side comparisons of benefits and representations that benefits are identical and "unchanged" and that the company with the power to reduce or eliminate them has a "bright future" are not about benefit terms and plan administration.

See also Willett v. Blue Cross & Blue Shield of Alabama, 953 F.2d 1335, 1341 (11th Cir. 1992) (fiduciary cannot "cast a blind eye" to a co-fiduciary's breach).

In *Fischer, supra*, the Third Circuit specifically held, moreover, that a company cannot construct a "Chinese wall" between what it knows as a corporation and what the persons in the benefits department know as the plan administrator. The Third Circuit stated that "fiduciary obligations owed to plan participants ... cannot be circumvented by building a Chinese wall around those on whom plan participants reasonably rely for important information and guidance." 994 F.2d at 135.

Noticeably, none of the circuit court decisions the Company cites supports its position. The Third Circuit's decision in *Blaw Knox Ret. Inc. Plan v. White Consol. Indus.*, 998 F.2d 1185 (3d Cir. 1993), did not involve any misrepresentations. It also did not alter *Fischer v. Philadelphia Electric, supra*, or the other Third Circuit precedent cited above. The Fifth Circuit's decision in *Borst v. Chevron Corp.*, 36 F.3d 1308 Cir. 1994), *cert. denied*, 115 S.Ct. 1699 (1995), did not concern misrepresentations that caused the participants or beneficiaries to suffer any injury. The Seventh Circuit's decision in *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir. 1988), *cert. denied*, 488 U.S. 981 (1988), only involved an employer's complete silence about a severance plan it was about to start. In other decisions, the Seventh Circuit has firmly taken the side that affirmative misrepresentations by corporate fiduciaries are a breach of duty. *See Anweiler v. American Elec. Power*

Service Corp., supra, 3 F.3d at 991.[8]

B. The Eighth Circuit Ordered Appropriate Equitable Relief

The plain language of Section 502(a)(3) provides that a participant may sue to obtain appropriate equitable relief for a violation of any provision of this title, which includes a breach of fiduciary duty. Amicus U.S. Chamber of Commerce argues that the restitution the Eighth Circuit granted is unavailable because it functions as a substitute for the monetary damages *Mertens* forbids. Amicus Br. at 22-26. NELA does not believe this issue is properly before the Court since Petitioner did not raise it, but offers the following rebuttal to indicate amicus' position were this Court to request full briefing.

Defendants routinely argue that plaintiffs use equity to substitute for monetary relief when plaintiffs are not offered monetary relief by a statute. Arguments such as the Chamber's have been made and rejected, *inter alia*, in Title VII cases in which relief must be equitable and in class actions in which plaintiffs seek Rule 23(b)(2) certification based on having claims for injunctive relief. Courts have held that seeking the financial benefits of an injunctive or other equitable order is hardly disqualification from obtaining appropriate equitable relief. *See, e.g., Forbush v.*

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[8] Petitioner also cites a Ninth Circuit case, *Lea v. Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990), holding that a company's role in collective bargaining is not a fiduciary one. There is no suggestion that Varity was participating in collective bargaining negotiations here.

J.C. Penney Pension Plan, 994 F.2d 1101, 1105 n.3 (5th Cir. 1993). See also *Chauffeurs Local 391 v. Terry*, 494 U.S. 558, 570-71 (1990) ("restitutionary" relief or relief "incidental or intertwined with" injunctive relief may be considered equitable).

In *Reich v. Continental Ins.*, 33 F.3d 754, 756-57 (7th Cir. 1994), Judge Posner explained that equitable restitution encompasses recovery for a party's "unjust avoidance" of a "loss" or "obligation." When a company has an "obligation" that it avoids through a breach of fiduciary duty or other violation of ERISA Title I, Section 502(a)(3) authorizes the federal courts to order appropriate equitable relief including restitution. *Accord Schwartz v. Gregori*, 45 F.3d 1017, 1022-23 (6th Cir. 1995) (back pay awarded under Section 502(a)(3) was restitutionary).[9]

While restitution and compensatory damages may, in some cases, both provide financial relief, they are not the same, as a comparison of two earlier Supreme Court cases with this case illustrates. In *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), Doris Russell sought extracontractual and punitive damages for delay and mishandling of her benefit claim. She could not have obtained the relief she prayed for by asking for restitution based on the value of the obligation that Massachusetts Mutual had unjustly avoided: Massachusetts Mutual's gain did not equal her losses. Likewise, in *Mertens v. Hewitt*

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[9] *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1528 n.5 (9th Cir. 1993), is the only ERISA case that seems to accept the proposition that if an equitable order involves money it must be characterized as legal.

Associates, 113 S.Ct. 2063 (1993), William Mertens and the other plaintiffs sought consequential damages from Hewitt Associates resulting from Hewitt's allegedly bad actuarial advice. They could not have obtained the relief they wanted by seeking restitution for any unjust gain or avoidance of loss on the part of Hewitt Associates. Here, by contrast, the Eighth Circuit only ordered restitution for Varity's unjust avoidance of its benefit obligations. It did not order that Varity pay compensatory damages resulting from its breach (e.g., consequential damages if medical conditions of retirees worsened due to the termination of health insurance coverage after MCC's collapse).

III. The Court Should Reserve Judgment on Other Avenues for Relief

NELA urges the Court to reserve judgment on other avenues for relief if this Court were to adopt the Company's arguments that equitable relief to relieve a breach of fiduciary duty is not available to individual participants or that the Company's misrepresentations here were not in breach of fiduciary duty. The Eighth Circuit has reserved judgment both on (i) whether the Company's misrepresentations constitute a violation of ERISA Section 510, 29 U.S.C. § 1140, and (ii) whether the Company may be estopped from denying benefits to retirees under the Massey-Ferguson plan who relied on the Company's representations about MCC.

The Eighth Circuit should also revisit the availability of relief under state law if this Court were to accept Varity's contention that it spoke to its employees only in an employer-employee capacity. If the Company wants

insulation for misrepresentations it maintains were made as a corporation in a wholly non-fiduciary capacity, it cannot simultaneously obtain insulation from the responsibility that corporations have under state law for their misrepresentations.

While ERISA's preemption section is expansive, it need not leave employees remediless for misrepresentations made by their employers or other parties. A long line of decisions have held that misrepresentations of benefits by non-fiduciaries that induce employees to terminate their benefit coverage or otherwise change their position are actionable under state law. *See Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 906 (1995) (ERISA does not preempt claim alleging fraudulent inducement to retire under an early retirement benefits package by telling employees their jobs were about to be eliminated); *Perkins v. Time Ins. Co.*, 898 F.2d 470 (5th Cir. 1990) (ERISA does not preempt claim against insurance agent for misrepresentations causing claimant to terminate prior coverage); *Martin v. Pate*, 749 F. Supp. 242 (S.D. Ala. 1990), *aff'd sub nom. Martin v. Continental Investors*, 934 F.2d 1265 (11th Cir. 1991) (claim of fraud in inducement to become beneficiary not preempted); *Pace v. Signal Technology Corp.*, 628 N.E.2d 20 (Mass. 1994) (ERISA does not preempt state law misrepresentation claim when employer misrepresents whether the employee will be covered by insurance, including long term disability, for period after job termination); *HealthAmerica v. Menton*, 551 So.2d 235 (Ala. 1989), *cert. denied*, 493 U.S. 1093 (1990) (claim of fraud in inducement to become beneficiary not preempted).

Employers like Varity who "sucker punch" employee plan beneficiaries should not have it both ways. They should not be permitted to maintain that they delivered misrepresentations only as an employer to an employee in order to escape ERISA's remedies, and simultaneously maintain they may also escape state law remedies for misrepresentations by an employer to an employee because of ERISA preemption. Some semblance of reasonableness and balance must govern.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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July 26, 1995

(9)

No. 94-1471

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

VARITY CORPORATION,
Petitioner,
v.

CHARLES HOWE, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICI CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Central States Pension Fund

Central States, Southeast and Southwest Areas Pension Fund is a multiemployer defined benefit pension trust fund established in 1955 by affiliates of the International Brotherhood of Teamsters and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act (LMRA). The Pension Fund is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). The trustees are plan fiduciaries within the meaning of Section 3(21)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.

§ 1002(21)(A). The Pension Fund is administered for the exclusive benefit of the participants to whom the trustees owe an undivided duty of loyalty. The purpose of the Pension Fund is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the Central States pension plan. Central States Pension Fund is the largest multiemployer pension plan in the country. Its current assets exceed $12.3 billion and the present value of its liabilities for vested benefits is approximately $14.5 billion. Participating employers contribute to the Pension Fund pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. The Pension Fund covers 170,000 retirees presently drawing benefits and 220,000 active participants of approximately 5,000 contributing employers.

Central States Health and Welfare Fund

Central States, Southeast and Southwest Areas Health and Welfare Fund was established in 1950. It provides health and welfare benefits to eligible employees of contributing employers that are signatory to collective bargaining agreements with local unions affiliated with the International Brotherhood of Teamsters. Like the Pension Fund, the Health and Welfare Fund is governed by a Board of Trustees consisting of four management and four union-appointed trustees, who are plan fiduciaries within the meaning of ERISA.[1] The Health and Welfare Fund has net assets of more than $130 million and provides benefits to more than 125,000 active participants, as well as over 20,000 retirees and their families.

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[1] The two funds are jointly administered under the direction of the same eight-member Board of Trustees. The Funds will hereafter be referred to collectively as Central States or individually as the Pension Fund and the Health and Welfare Fund.

Interests of Central States

The Central States plans are multiemployer plans and thus are fundamentally different from the single-employer plan administered by Petitioner Varity Corporation ("Varity") which is the subject of this case. Multiemployer plans are funded by more than one employer (in the case of Central States, thousands of employers) and are administered by an independent board of trustees who are the plan fiduciaries. Varity's plan by contrast is funded by Varity which also administers the plan and is the plan fiduciary. Despite these differences in these types of plans, ERISA applies a single set of rules to both. Central States is concerned that the ruling in this single-employer plan case should also take into account its impact on multiemployer plans.

The court below ruled that individual plan participants may maintain an action for equitable relief against a plan fiduciary pursuant to Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). As relief for the fiduciary breaches by Varity, the court ordered that certain retirees be restored to their original health and welfare plan. The court further ordered "restitution" be made by Varity to these retirees for their lost benefits. This latter form of relief is of concern to Central States (and to multiemployer plans generally). Ordinarily benefits are paid by plans, not fiduciaries. In ordering restitution from Varity, the court below did not specify whether Varity would pay these benefits from its plan or directly. Because Varity was the sole source of plan funding, it would pay in either case. If, however, this restitution remedy were applied under similar circumstances to the trustees of a multiemployer plan, the same would not be true. If payment of the benefits is deemed a personal liability of the trustees rather than the plan, the plan (and indirectly its contributing employers) is relieved of an obligation that was otherwise its to pay. And if decisions by trustees regarding the payment of benefits can be construed as

fiduciary breaches that subject the individual trustees to personal liability for the benefits, then there will be no trustees for none will serve.

SUMMARY OF ARGUMENT

The court below ruled that a cause of action may be maintained under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), by individual plan participants for their own benefit against a plan fiduciary to enjoin a breach of fiduciary duty. Specifically the court affirmed a district court ruling that Varity had breached its fiduciary duties to certain retiree participants in its health and welfare plan by transferring them to a new plan that subsequently folded. The court ruled that Varity must restore the participants to their original plan. The court, then, ruled that "restitution" to these participants be made by Varity as a further form of equitable relief.

Assuming that the court below was correct in its first ruling—that a cause of action against a fiduciary may be brought under § 502(a)(3) and that an injunction against Varity to restore the retirees to their original plan is appropriate equitable relief—was the court also correct in ordering restitution from Varity? If the answer is yes, this court should clarify the rationale for that relief. In Varity's case an order to pay the retirees' lost benefits does not need further refinement because Varity is the source of plan assets to pay the benefits in any event. Multiemployer plans to which this kind of ruling might be applied are different in that the fiduciaries (the plan's trustees) are not the source of plan assets. An order of restitution directed against the trustees personally would not be appropriate equitable relief because the trustees did not gain from the participant's loss. Such liability for trustees would dangerously destabilize multiemployer plans for who would accept such a job at such risk.

Section 409(a) of ERISA, 29 U.S.C. § 1109(a), limits the pensonal liability of fiduciaries for their fiduciary

breaches to that amount necessary to make the plan whole. An action against a fiduciary under § 502(a)(3) for a fiduciary breach may result in other equitable relief, but should not extend the scope of personal liability. To the extent "restitution" is an available remedy under § 502(a)(3), it should restore the parties to their prior positions. Only if the loss to the participants inures to the benefit of the fiduciary, should direct restitution be available. If the fiduciary does not benefit, as is generally the case with multiemployer plan trustees, personal liability for lost benefits is not appropriate relief. This does not mean that no relief is available. If a court may restore the participants to the plan under § 502(a)(3), as the court did here, then it has restored the plan's obligation to pay the participants' benefits. Thus the remedy should be payment by the plan (which loses nothing it should not have paid in the first place), not by the trustees personally. The appropriate "restitution" remedy under § 502(a)(3) would be an injunction that the fiduciary cause the plan to pay the benefit. Alternatively, the participant would have a cause of action against the plan under § 502(a)(1) for the benefits that were otherwise lost.

ARGUMENT

I. RESTITUTION ORDERS AGAINST TRUSTEES WOULD BE UNTENABLE FOR MULTIEMPLOYER PLANS.

In the single-employer plan at issue here the fiduciary (Varity) is also the source of funding for the plan. By ordering Varity, the fiduciary, to make restitution the court, in effect, also orders Varity, the sole source of funding for the plan, to pay benefits to these participants. This is the same as ordering the plan itself to make the payments. Both parties below are, therefore, largely indifferent to how the monetary relief is characterized because however so, its source is the same. This reflects in the decision below, which does not draw such distinctions. These distinctions are, however, very important for

other plans and especially for multiemployer plans where the source of funding and the fiduciaries are different. In the case of a multiemployer plan, to order that a fiduciary make restitution for payments otherwise due under the plan is to introduce a different source of funding for these benefits; and the plan (and those who fund it) are relieved of the obligation that would otherwise be theirs to pay the benefits.

If the decision below is affirmed without clarification, then courts may begin to allow fiduciary claims resulting in restitution orders against trustees of multiemployer plans in cases like this that involve only the payment of benefits to individual participants. We can be sure of two effects. First, it is unlikely that trustees generally will be able to pay these benefits. Trustees, generally, will not have the resources to satisfy the order. Nor is a fiduciary breach the kind of event that may readily be insured. As a consequence trustee personal liability is probably not an adequate remedy for a participant's lost benefits. Second, who would serve as a trustee if personal liability under the circumstances of this case is the cost. Trustees are volunteers who generally serve without pay. They do not expect or accept the risk of having to pay benefits of participants in lieu of the plan. It is unlikely that any qualified person would take such a risk, nor would it be reasonable to expect anyone to assume it.

In sum the availability of a broad restitution remedy to apply to multiemployer plan trustees for the benefit of individual participants would not provide an adequate remedy to participants and would harm plans by driving away trustees.

Central States does not, however, contend that the court below was wrong in ordering restitution from Varity. The problem, in Central States view, is that if the court below is simply affirmed, it may be construed that ERISA fiduciaries generally are personally liable to make restitution for their fiduciary breaches resulting from

their decisions regarding participation and the payment of benefits. Central States believes that such a broad interpretation should be rejected and that this Court should clarify that restitution from fiduciaries to individual participants is available only where the fiduciary was enriched at the individual's expense. This is clearly the case with Varity, but would generally not be the case with trustees of multiemployer plans.

II. RESTITUTION SHOULD COME FROM THE PLAN.

Having held that § 502(c)(3) permits an individual action against a fiduciary for a breach of fiduciary duty, the courts below sought relief within the scope of that provision. Section 502(a)(3) allows injunctions against violations of ERISA and "other appropriate equitable relief." Accordingly the court of appeals affirmed an injunction to restore the retirees to their original plan. The court also affirmed so much of the district court's ruling that ordered restitution of lost benefits to the retirees by Varity. The court of appeals did not specify its rationale for why Varity should make restitution rather than the plan to which the individuals were restored.

Under Section 409(a) of ERISA, 29 U.S.C. § 1109(a), however, a plan fiduciary is "personally" liable only to make good to such plan any losses to the plan resulting from such breach. Section 409(a) is enforced through § 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2). Relief to individuals is not available under these provisions. *Massachusetts Mutual Life Ins. Co. v. Rusell*, 473 U.S. 134 (1985). Individual relief may be found in § 502(a)(1) (to recover benefits) and in § 502(a)(3) (to enjoin violations of the statute and for other appropriate equitable relief). The court below ruled that a fiduciary breach that damages an individual may be redressed through § 502(a)(3), and restoration

of the retirees here to their original plan would appear to be appropriate equitable relief.

In light of the limits provided by § 409(a), however, is it appropriate equitable relief to expand the personal liability of fiduciaries under § 502(a)(3)? Central States agrees for purposes of this brief that an order of restitution against Varity was appropriate. But the order against Varity can be viewed in two ways (with the same effect) that are consistent with the statute. First, Varity profited at the expense of the retirees—a classic circumstance justifying restitution. *See Tull v. U.S.*, 481 U.S. 412, 424 (1987) citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946); *see also Health Cost Controls v. Skinner*, 44 F.3d 535, 538 (7th Cir. 1995). But also the order could be construed as directing Varity, who controlled and funded the plan, to make restitution from the assets of the plan for the lost benefits. It would be unnecessary for the court below to put such a fine point on its order, however, because Varity will pay in any event and the status quo will be restored.

In order to restore the status quo where a multiemployer plan is involved, the restitution order must be more precise. The trustees of the plan do not profit from this kind of fiduciary breach, so there is no ill-gotten gain to be restored to the participant by the fiduciary personally. On the other hand the plan has been enriched to the extent it did not pay benefits it otherwise would have. And the contributors to the plan benefit indirectly through lower plan payments. So the multiemployer plan, not the trustee, should make restitution to an individual deprived of a benefit through a fiduciary breach.

There are two routes to this more appropriate remedy. One would be an action against the plan under § 502(a)(1) for payment of the benefit. But a plaintiff who lacks the foresight to make the plan a defendant is not without remedy. It is within the power of the court to

enjoin the fiduciaries not only to restore the individual's status as a participant, but to restore the benefits as well. An order directing the trustees of a multiemployer plan to cause the plan to pay the lost benefits restores each party and the plan to their rightful positions as if the breach had not occurred. The plan and its contributing employers are no worse off since the benefits should have been paid in the first place; the participant receives the benefits that were due; and the trustees perform their duty as they should have in the first place.

In sum, if this court affirms the court below it should clarify that the restitution remedy under § 502(a)(3) is directed to the fiduciary's obligations to pay benefits under the plan and not to the personal liability of the fiduciary.

CONCLUSION

The court below reached the correct result and should be affirmed, but the rationale of that result should be clarified to limit the restitution remedy to the plan, not the fiduciary.

Respectfully submitted,

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No. 94-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VARITY CORPORATION,
Petitioner,

v.

CHARLES HOWE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than thirty-two million persons, age fifty or older, dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity and purpose. One of AARP's primary goals is to promote the economic security of individuals as they age, by

increasing the availability, security, equity, and adequacy of health benefits.

Employer-funded retiree health insurance is an important source of income security for older Americans.[1] Such coverage provides health benefits for retirees who are under age 65 and ineligible for Medicare benefits as well as "Medigap" coverage for retirees who are over age 65.[2]

Approximately thirteen million of AARP's members are under age sixty-five. They are generally not eligible for Medicare and, therefore, rely on employer-funded health benefits. Since the day that AARP was founded in 1958, access to health care has been a major association priority. AARP's interest in health care benefits for an aging work force stems from its longstanding commitment to address the health care needs of older Americans.

Health insurance coverage is essential to adequate medical care in this country. A major concern of AARP members is whether they will have adequate health insurance coverage, especially in the event of hospitalization, long-term disability or catastrophic illness. Significant barriers frequently faced by AARP members in obtaining such coverage are preexisting medical conditions or exorbitant costs.

If employers are permitted to eliminate coverage for retirees under an employer health insurance plan, notwithstanding corporate representations to the contrary,

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1/ Shelia R. Zedlewski, "Retirees with Employment-Based Health Insurance," in Trends in Health Benefits 147, 148-49 (eds. J. Turner and D. Beller, U.S. Department of Labor Pension and Welfare Benefits Administration 1993).

2/ "Medigap" coverage is insurance that pays for certain medical expenses that are not covered by Medicare. Id. at 147.

it may be virtually impossible for the retirees to obtain comparable coverage elsewhere. Since a number of illnesses which require extensive treatment occur more frequently in the older population, AARP members face significant risks when their health benefits coverage is terminated during retirement. The outcome of this case could effect the provision of health benefits coverage for a substantial number of retirees. Recent studies report that approximately 8 million retirees receive health benefits coverage under an employer-sponsored plan.[3] In light of the significance of the issues presented by this case, AARP respectfully submits this brief amicus curiae.[4]

BACKGROUND

Petitioner, Varity Corporation (Varity), created an elaborate business scheme, in part, to terminate health benefits coverage for many of its retirees. To avoid financial problems, Varity spun off a failing sales division into a separate company. From its inception, the spinoff company was substantially underfunded and lacked the financial resources to provide health benefits for its employees and retirees.

Varity nonetheless transferred ten of its retirees from its health plan to the spinoff company's health plan. Varity never notified the retirees of the transfer nor sought their consent. Varity also induced several

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3/ This figure is based upon studies for years 1987 and 1988. These studies include those retirees who receive employer-provided coverage until they become eligible for Medicare as well as those retirees whose coverage continues throughout their retirement. Id. at 149. Employers paid all or part of the cost of insurance coverage for approximately 6 million of the approximately 8 million retirees who are covered under employer-sponsored plans. Id. at 158.

4/ The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

of its employees to transfer to the spinoff company by misleading statements or omissions that failed to notify them that the company was financially unable to continue to provide benefits coverage similar to the coverage that they were receiving, and would be entitled to continue to receive after retirement, under Varity's health plan.

Two years after it was formed, the spinoff company filed for bankruptcy. The company subsequently terminated its health plan resulting in the complete loss of health benefits coverage for the retirees and employees whom Varity had transferred to the spinoff company's plan.[5] But for Varity's actions, the Respondents would have been entitled to receive health benefits under Varity's plan.

Respondents filed suit claiming, in part, that Petitioner had breached its fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. The U.S. District Court for the Southern District of Iowa entered judgment in favor of Respondents. Howe v. Varity Corp., 36 F.3d 746, 748 (8th Cir. 1994). On appeal, the Eighth Circuit affirmed, holding that Varity had breached its fiduciary duty to the Respondents and under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), they were entitled to equitable relief on their own behalf to redress the breach. Howe v. Varity Corp., 36 F.3d at 755.

AARP supports the Eighth Circuit's opinion which holds fiduciaries liable to individual participants and their beneficiaries when they breach their fiduciary duty by misrepresentations or omissions that cause such participants and beneficiaries to lose their health

[5] Those employees who were induced to transfer to the new corporation also have retired. Thus, all of the Respondents are retirees. Brief of Petitioner at 3.

benefits coverage.[6] As discussed below, the plain meaning of ERISA § 502(a)(3), the structure of the civil enforcement scheme under ERISA § 502(a), ERISA's legislative history, and its remedial purposes support affirmance of the Eighth Circuit's holding that Respondents are entitled to individual relief from Petitioner for its fiduciary breach.

SUMMARY OF ARGUMENT

The plain language of ERISA § 502(a)(3) confers authority on participants and beneficiaries to enforce violations for a fiduciary breach and obtain equitable relief to redress such violations. Moreover, any other construction of ERISA § 502(a)(3) to limit available relief only to plan-based relief would render its terms superfluous in remedying fiduciary violations, thereby ignoring the fundamental rule of statutory construction that, if possible, a provision be construed so that every word has some operative effect. See, e.g., Mertens v. Hewitt Associates, 113 S. Ct. 2063, 2069 (1993).

The Eighth Circuit properly held that ERISA § 502(a)(3) authorizes participants and beneficiaries to obtain individual relief for a breach of fiduciary duty under ERISA § 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A). Under the appeals court's holding, the relief available to participants and beneficiaries under ERISA to remedy a claim for a fiduciary breach is not limited to a plan but also, in appropriate cases, may flow to individuals. This decision protects participants and

[6] Certiorari was granted on two questions: (1) whether the relief provided under ERISA § 502(a)(3) authorizes recovery on behalf of individual participants and their beneficiaries for a breach of fiduciary duty, and (2) whether Petitioner breached its fiduciary duty by misleading Respondents, or failing to disclose to them, that their health benefits coverage with the spinoff company were certain to terminate. AARP's brief addresses only the first question.

their beneficiaries by authorizing them to obtain relief on their own behalf when a fiduciary breaches its fiduciary duties under ERISA.

Absent individual relief for a fiduciary breach under ERISA, participants and beneficiaries would be left without a remedy to redress a fiduciary breach in those cases where recovery cannot be made to the plan or where plan-based relief is inappropriate. This result is clearly contrary to ERISA's stated policy, recognized by this Court, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983), of protecting the interests of participants and beneficiaries in employee benefit plans. ERISA § 2(b), 29 U.S.C. § 1001(b).

ARGUMENT

I. ERISA § 502(a)(3) AUTHORIZES INDIVIDUAL RELIEF FOR PARTICIPANTS AND THEIR BENEFICIARIES FOR A FIDUCIARY BREACH.

One of the issues before this Court is whether ERISA § 502(a)(3) authorizes recovery by individual participants and their beneficiaries for a fiduciary breach. A first step in statutory analysis is an examination of the statute's plain language. "[A]ny exercise of statutory construction [begins] with the text of the provision in question, and move[s] on, as need be, to the structure and purpose of the Act in which it occurs." New York State Conference of Blue Cross & Blue Shield Plans v. Travelers' Insurance Co., 115 S. Ct. 1671, 1677 (1995) (citing Shaw v. Delta Air Lines, Inc., 463 U.S. at 95); see, e.g., Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990) ("To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute.")

To interpret a statute, one must "'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990) (quoting Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985)); see also Patterson v. Shumate, 112 S. Ct. 2242, 2246 (1992) ("The plain language of . . . ERISA is our determinant."). Even if the statutory language is unambiguous, the context in which the language is used should be scrutinized in order to confirm its true meaning. King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context"). As a last step, a review of the legislative history may assist in determining, or corroborating, the meaning of the statutory language. Blum v. Stenson, 465 U.S. 886, 896 (1984) ("Where . . . resolution of a question of federal law turns on a statute and the intention of Congress, [courts] look first to the statutory language and then to the legislative history if the statutory language is unclear.").

A. The Plain Language of ERISA § 502(a)(3) Authorizes Equitable Relief for Individual Participants and Their Beneficiaries to Redress a Fiduciary Breach.

Section 502(a)(3) authorizes a civil action -

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates <u>any</u> provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce <u>any</u> provisions of this title or the terms of the plan.

29 U.S.C § 1132(a)(3) (emphasis added).

By its plain terms, ERISA § 502(a)(3) confers enforcement authority on participants and their beneficiaries to obtain relief for a fiduciary breach. The provision allows participants and beneficiaries to bring a civil action for injunctive relief for a violation

of "any provision" of Title I and to obtain "appropriate equitable relief" to redress a violation under Title I or to enforce "any provisions" of that Title. Id. Title I includes ERISA § 404(a)(1) which sets out the standards that govern a fiduciary's duties with respect to a plan and its participants and beneficiaries.[7] The only limit imposed on the relief authorized by ERISA § 502(a)(3) is that it be in the form of injunctive or "other appropriate equitable relief." Id.[8] Accordingly, ERISA § 502(a)(3) by its plain terms provides injunctive or equitable relief running to individual participants and beneficiaries to

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[7] ERISA § 404(a) states in relevant part -

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries . . . .

29 U.S.C. § 1104(a).

[8] The Eighth Circuit ordered that Varity be enjoined to enroll Respondents in its health plan and also ordered restitution of the health benefits that Respondents would have received but for Varity's breach. Howe v. Varity Corp., 36 F.3d at 756-57. Petitioner did not request review of the question of whether such relief constitutes "appropriate equitable relief" under ERISA § 502 (a)(3), and the Court did not grant certiorari on this issue. See n.6, supra. Hence, AARP's brief does not examine this issue because it is not before the Court. Sup. Ct. R. 14.1(a); Caspari v. Bohlen, 114 S.Ct. 948, 952 (1994) ("We have consistently declined to consider issues not raised in the petition for . . . certiorari. . . . Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.").

redress a fiduciary breach.[9]

Construing ERISA § 502(a)(3) as authorizing individual relief for a fiduciary breach is consistent with the Court's analysis of the term "appropriate equitable relief" under that provision in Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993). The issue before the Court in Mertens was whether a nonfiduciary who knowingly participated in a fiduciary breach was liable to the plan for losses as a result of such breach. Mertens, 113 S. Ct. at 2066. The Court's analysis of that question focused on whether Congress intended "appropriate equitable relief" to mean compensatory damages or monetary relief. Id. at 2068. In construing that term, the Court applied the established rule that a statute, if possible, be construed in such a fashion that every word has some operative effect so that no part will be rendered superfluous. Id. at 2069 ("We will not read the statute to render the modifier superfluous.") (citing United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1015 (1992); Moskal v. United States, 498 U.S. 103, 109-10 (1990)). Under that rule, the Court concluded that "appropriate equitable relief" under ERISA § 502(a)(3) does not mean compensatory damages or monetary relief because that interpretation would render the term "equitable" superfluous. Id.

Applying this rule of statutory construction here precludes reading ERISA § 502(a)(3) as authorizing only plan-based relief for a fiduciary breach. Such an

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[9] Petitioner has ignored this Court's admonition to "begin as we do in any exercise of statutory construction with the text of the provision in question . . . ." New York State Conference of Blue Cross & Blue Shield Plans v. Travelers' Insurance Co., 115 S. Ct. at 1677. Petitioner rejects without comment this basic rule of statutory construction and fails to make any argument that the plain meaning of ERISA § 502(a)(3) supports its interpretation that the provision authorizes only plan-based relief.

interpretation would render ERISA § 502(a)(3) superfluous in remedying a fiduciary breach, since ERISA § 502(a)(2)[10] provides an equitable plan-based remedy for an action enforcing ERISA's fiduciary duty provisions. Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 144 (1985).

Section 502(a)(3) specifically authorizes participants and beneficiaries to bring a civil action to enforce "any" provision under Title I. If Congress had intended to limit ERISA § 502(a)(3)'s enforcement authority, it would not have used the phrase "any" to describe the type of Title I violations that are enforceable under the provision. The use of the term "any" indicates Congress' intent to make fiduciary breach claims enforceable under ERISA § 502(a)(3). See City of Edmonds v. Oxford House, Inc., 115 S. Ct. 1776, 1784 n.1 (1995) ("A broad construction of the word 'any' is hardly novel.") (citing John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank, 114 S. Ct. 517, 524 (1993); Citizens' Bank v. Parker, 192 U.S. 73, 81 (1904) ("The word any excludes selection or distinction.")). Because ERISA § 502(a)(3) provides an enforcement action for a fiduciary breach - as the plain language of the provision clearly states that it does - it follows that the relief authorized to remedy such violation must be independent from that authorized under ERISA § 502(a)(2) in order to avoid a construction of ERISA § 502(a)(3) that would render it superfluous to ERISA § 502(a)(2) in remedying a fiduciary breach.

10/ Section 502(a)(2) states -

> A civil action may be brought . . .
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409.

29 U.S.C. § 1132(a)(2)

Construing ERISA § 502(a)(3) as authorizing individual relief to redress a fiduciary breach, is not precluded by the Court's decision in Russell. Russell held that a fiduciary could not be held liable under ERISA § 409(a)[11] to a participant or beneficiary for compensatory or punitive damages for a fiduciary breach. Russell, 473 U.S. at 148. Russell acknowledged that ERISA § 409 is specifically enforceable under, as well as expressly incorporated by reference into, ERISA § 502(a)(2). Id. at 140. The Court reasoned that, because the language of ERISA § 409 authorizes only plan-based relief, the remedy for an action that is brought under ERISA § 502(a)(2) to enforce a violation of § 409(a) runs only to the plan and, thus, does not inure to the benefit of the individual participants or beneficiaries. Id. at 140, 144. Because the plaintiff in Russell "relie[d] entirely on § 409(a) and expressly disclaim[ed] reliance on § 502(a)(3)," the Court declined to consider whether the relief sought was recoverable under ERISA § 502(a)(3). Id. at 139 n.5. Unquestionably, Russell is explicitly limited to ERISA § 502(a)(2).

11/ ERISA § 409(a) states -

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

29 U.S.C. § 1109(a).

Moreover, Russell supports the plain meaning construction of ERISA § 502(a)(3). The Court examined the language of ERISA § 502(a)(2), and the specific incorporation of ERISA § 409 into ERISA § 502(a)(2), and found that the language of ERISA § 409 must be given its plain meaning. Quite simply, the Court held that the incorporation of ERISA § 409 requires that relief under ERISA § 502(a)(2) must be limited to the relief provided in ERISA § 409 - plan-based relief. In stark contrast, ERISA § 502(a)(3) does not incorporate ERISA § 409, and therefore ERISA § 409 does not limit the relief to be provided by that section. Any other reading ignores "an enforcement scheme crafted with . . . evident care." Id. at 147.

B. ERISA's Civil Enforcement Scheme Confirms the Plain Meaning of ERISA § 502(a)(3) Authorizing Equitable Relief to Individual Participants and Beneficiaries to Redress a Fiduciary Breach.

The language of ERISA § 502(a)(3) authorizing individual relief to participants and beneficiaries is consistent with ERISA's "carefully integrated civil enforcement" scheme under ERISA § 502(a). Mertens, 113 S. Ct. at 2066 (citing Russell, 473 U.S. at 146). Sections 502(a)(2) and 502(a)(3) provide independent methods for remedying a fiduciary breach. Whereas ERISA § 502(a)(2) authorizes broad recovery for a plan by providing both legal and equitable relief to remedy a fiduciary breach, ERISA § 502(a)(3) authorizes more limited relief for individuals by providing only equitable relief running to participants and beneficiaries to remedy a fiduciary breach. Thus, ERISA § 502(a)(3) complements ERISA's "integrated" enforcement scheme by authorizing separate relief for participants and beneficiaries to redress a fiduciary breach when plan-based relief is not available or appropriate.

This construction of ERISA's enforcement scheme does not "authorize other remedies that [Congress] simply forgot to incorporate directly." Mertens, 113 S. Ct. at 2067 (citing Russell, 473 U.S. at 146-47). The several references in ERISA § 409 that a fiduciary's liability thereunder is to the "plan" indicate Congress' intent that an action by a participant or beneficiary under ERISA § 502(a)(2) to enforce ERISA § 409 be undertaken in a derivative capacity or on behalf of the plan. By comparison, ERISA § 502(a)(3) is devoid of any similar language indicating that the relief authorized thereunder should be construed as being only plan-based. If Congress had wanted the relief authorized under ERISA § 502(a)(3) for a fiduciary breach to also be derivative, it would have drafted the provision to say so. See Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress included particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") Because it did not, suggests Congress' intent to provide under ERISA § 502(a)(3) relief for a fiduciary breach that is separate from the derivative type of relief that is authorized for a fiduciary breach under ERISA § 502(a)(2).

ERISA's legislative history also indicates Congress' intent that ERISA § 502(a)(3) authorize individual relief to redress a fiduciary breach. ERISA's Conference Report states that under ERISA § 502(a) a "civil action may be brought by a participant or beneficiary to recover benefits due under the plan . . . and for relief from [a] breach of fiduciary responsibility." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 326-37 (1974), reprinted in 3 Subcomm. on Labor of the Senate Comm. of Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (Leg. Hist.) 4277, 4593-94 (1976). Senator Williams, a principal sponsor of ERISA, similarly remarked during the floor

debate on final passage of the Act, that under ERISA § 502(a) "individual participants and beneficiaries will also be able to bring suit in Federal court . . . to obtain redress of fiduciary violations." 120 Cong. Rec. 29933 (1974), reprinted in Leg. Hist. at 4745 (statement of Sen. Williams).

C. ERISA's Policy Corroborates the Plain Meaning of ERISA § 502(a)(3) Authorizing Equitable Relief to Individual Participants and Beneficiaries to Redress a Fiduciary Breach.

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Ingersoll-Rand Co. v. McClendon, 111 S. Ct. at 482 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. at 90); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989). ERISA's underlying policy is to protect the interests of participants and beneficiaries in employee benefit plans by "establishing standards of conduct, responsibility, and obligation for fiduciaries" and "by providing for appropriate remedies and sanctions" for violations of these fiduciary standards. ERISA § 2(b), 29 U.S.C. § 1001(b).

Construing ERISA § 502(a)(3) as authorizing relief that inures to the benefit of individual participants and beneficiaries is clearly within the scope of ERISA's remedial purposes of protecting the interests of participants and beneficiaries in employee benefit plans. Absent any private relief, participants and beneficiaries would be left without a remedy to redress a fiduciary breach in those cases where recovery cannot be made to the plan or where plan-based relief is inappropriate. Howe v. Varity Corp., 36 F.3d at 755 ("It is not

irrelevant that a contrary holding would leave unredressed an egregious wrong.") [12]

Any construction of ERISA § 502(a)(3) other than its plain language would condemn retirees to the loss of their health benefits coverage without any recourse to redress that loss, even though it was the result of a fiduciary breach. Such a result clearly is contrary to ERISA's stated policy, recognized by this Court, Shaw v. Delta Air Lines Inc., 463 U.S. at 90, of protecting the interests of participants and beneficiaries in employee benefit plans.

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[12] Given the "expansive sweep" of ERISA's preemption provision, a common law cause of action by Respondents based upon a claim for fiduciary breach undoubtedly would be preempted under ERISA § 514(a). See, e.g. Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 47-48 (1987).

CONCLUSION

The relevant text of ERISA, the structure of its entire enforcement scheme, ERISA's legislative history and the purposes of the Act all support the conclusion that ERISA § 502(a)(3) authorizes equitable relief to participants and beneficiaries to remedy a fiduciary breach. For the foregoing reasons, AARP urges the Court to affirm the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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July 26, 1995

(2)

No. 94-1471

In The

Supreme Court of the United States

October Term, 1995

VARITY CORPORATION,

Petitioner,

v.

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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INTEREST OF *AMICUS CURIAE*

The National Association of Securities and Commercial Law Attorneys ("NASCAT") is an association of law firms and attorneys who litigate cases involving antitrust, commercial, consumer, employee and retiree benefits, environmental and securities fraud claims in federal and state courts. NASCAT's members represent victims of corporate abuse, fraudulent schemes and so-called "white-collar" criminal activity, including victims of the type of pension and benefits fraud at issue in this case. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent wrongful, fraudulent, deceptive and manipulative business practices.

Claims arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §1001, *et seq.*, are an important weapon used by NASCAT members to enforce employees and retirees' rights. Accordingly, with the written consent of the parties, NASCAT files its *amicus curiae* brief in support of Respondents and urges this Court to affirm the decision of the court below.[1]

[1] The decision of the court below is reported as *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *cert. granted*, ___ U.S. ___, 115 S. Ct. 1792. Citations to the slip opinion reprinted in Petitioner's Appendix are stated herein as "___a."

INTRODUCTION AND SUMMARY OF ARGUMENT

As set forth in the undisputed findings of fact entered by the district court and affirmed by the Eighth Circuit Court of Appeals, Petitioner, through a scheme it code-named "Project Sunshine," induced Respondents to transfer their employment to Massey Combines Corporation ("MCC") for the purpose of ridding Massey-Ferguson, Inc. ("M-F") and Varity Corporation ("Varity") of substantial obligations for employee benefits. 54a, 57a, 62a, 64a-65a. Acting with intent to deceive, Petitioner made material misrepresentations and concealed material facts in order to induce its employees to cease participation in viable benefit plans and, instead, to join new ones that were doomed to fail. *Id.*

From the outset of its fraudulent scheme, Petitioner purposefully disseminated incomplete, confusing and deceptive communications regarding Project Sunshine.[2] Although it developed accurate and forthright communications concerning the plans and benefits thereunder, Petitioner opted *not* to disseminate them for fear that employees who obtained accurate and complete information

[2] The fact that Petitioner named the program "Project Sunshine," casts serious doubt over whether it took its fiduciary obligations under ERISA seriously or even understood the concept. The word "sunshine" is frequently used to refer to hopefulness for the future or openness and disclosure. *See* Webster's *Third New International Dictionary* 2292 (1986) (listing one definition of "sunshine" as "radiating optimism"); Government in the Sunshine Act, Pub. L. 94-409, 90 Stat. 1247, codified at 5 U.S.C. §552b (requiring that meetings of federal agencies "shall be open to public observation"); L. Brandeis, *Other People's Money* 62 (1914) ("[s]unlight is said to be the best of disinfectants").

would refuse to be transferred to MCC. 63a-64a. Petitioner misrepresented MCC's financial outlook and the nature of future employee benefits, anticipating and intending that employees would sign up for Project Sunshine, thereby ridding M-F and Verity of huge benefit liabilities and transferring the liabilities to a shell company that was earmarked for failure. 55a-56a, 63a-65a. Petitioner even assured participants that their benefits would remain unchanged, even though MCC was deliberately set up to fail. 64a. Petitioner knew that its communications were materially misleading when they were given and the employees relied on them to their detriment. 65a.

After hearing all of the evidence in this case, the trial court concluded as follows:

> Varity and Massey Ferguson were in no different a situation than any of the other agricultural equipment manufacturers experiencing tough financial constraints during this period. However, in the face of difficult financial times Varity disregarded existing law and devised a plan which dramatically cut its debt burden and heritage costs. Project Sunshine was nothing more than a brilliant manipulative effort to sever retiree welfare obligations which had become a burdensome load on a financially strapped company. Project Sunshine was a sucker punch on loyal employees who had given a lifetime of service to a company and who had been induced into believing that their benefits coverage could not be terminated once they retired. ERISA was enacted to prevent just such a maneuver as was undertaken in Project Sunshine.

114a.

Left with no other argument, Petitioner contends in this Court that it can escape liability for its deliberate misrepresentations because it supposedly made those misrepresentations while acting outside of its fiduciary capacity.[3] While it may have been a business decision (exempt from ERISA's fiduciary standards) for Petitioner to improve Varity's balance sheet by creating MCC and undercapitalizing it, Petitioner was acting as fiduciaries of both the old and new plans when it intentionally misled Respondents into "voluntarily" relinquishing participation in viable plans and induced them to join new ones that were destined to fail.[4]

Petitioner cynically submits that ERISA provides no remedy where (as here) a fiduciary issues false and misleading statements which result in harm to a participant or beneficiary, even though it knows that ERISA may well preempt any remedies that would otherwise be available under state law.[5] Petitioner's argument finds no support

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[3] In order to determine whether Petitioner acted as a fiduciary, the Court must examine the particular activity that is at issue and *not* Petitioner's self-proclaimed non-fiduciary status. *See Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1051 (1993).

[4] MCC adopted no employee benefits plan for the first year of the company's operation, at which point it adopted the M-F plan. Prior to that, MCC simply used the M-F plan. 76a. Throughout MCC's existence, Varity and M-F were fiduciaries of MCC's employee benefit plans, M-F's board of directors was the "named fiduciary" and M-F was the "administrator" and "plan sponsor." 78a-79a. Thus, Petitioner was a fiduciary of both the old and new plans.

[5] *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 (1987) (common law tort claims that "relate to" an employee benefit plan are preempted by ERISA); *Shaw v. Delta Airlines, Inc.*, 463

in ERISA's text, structure, or legislative history, and it is inconsistent with sound public policy. In this important case, which may well affect the rights and benefits owed to hundreds of thousands of employees and retirees, there is simply no question but that Petitioner breached its fiduciary duties to Respondents and that Respondents are entitled to the relief they were awarded. To hold otherwise would immunize fiduciaries from claims for egregious breaches of the duties they owe under ERISA to participants and beneficiaries of employee benefit plans.

ARGUMENT

A. THE EXISTENCE AND SCOPE OF FIDUCIARY DUTIES UNDER ERISA'S STATUTORY SCHEME: SECTION 404

Sections 404(a) and 406 of ERISA specify the basic duties of a fiduciary: A fiduciary must discharge his or her duties solely in the interest of the participants, for the exclusive purpose of providing benefits to participants,

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U.S. 85, 92 (1983) (ERISA's preemption provision is not limited to state laws addressing the subject matters specifically addressed by ERISA); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (same). *But see Farr v. U.S. West, Inc.*, No. 93-35086, 1995 U.S. App. LEXIS 15705 (9th Cir. June 26, 1995) (misrepresentations regarding the tax consequences of a lump sum withdrawal from pension plan not preempted); *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1405-06 (11th Cir. 1994) (fraud claim arising from employer's false statement that plant was being shut down held not preempted even though plaintiffs' damages may be affected by calculation of pension benefits), *cert. denied*, ___ U.S. ___, 115 S. Ct. 906 (1995).

with care, skill, prudence, and diligence. 29 U.S.C. §§ 1104(a), 1106. In the words of Judge Friendly, the obligations of a fiduciary under ERISA are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982) (citation omitted).

By enacting Section 404(a) and 406 of ERISA, Congress intended that fiduciary duties imposed under ERISA should parallel fiduciary duties owed at common law:

> [R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility.

Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985) (footnote omitted; emphasis in original).[6]

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[6] *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-14 (1989) (ERISA is to be construed under principles of trust law not to afford less protection to employees than they enjoyed before ERISA was enacted); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 152-53, 156-57 n.6 (1985); *Donovan v. Cunningham*, 716 F.2d 1455, 1464 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (ERISA's legislative history indicates that Congress intended to incorporate in §404 the "core principles of fiduciary conduct" that were developed in the common law of trusts, but with modifications appropriate for employee benefit plans); *see also Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 955 (D.C. Cir. 1985); *Mahoney v. Board of Trustees*, 973 F.2d 968, 971 (1st Cir. 1992) (Breyer, J.); *Bierwirth*, 754 F.2d at 1055; *McMahon v. McDowell*, 794 F.2d 100, 110 (3d Cir. 1986), *cert. denied*, 479 U.S. 971 (1986); *Witmeyer v. Kilroy*, 788 F.2d 1021, 1025 (4th Cir. 1986); *Cunningham*, 716 F.2d at 1464; *De Marco v. C & L Masonry, Inc.*,

At common law, fiduciaries were required, at a minimum, to fully disclose all facts within their knowledge which beneficiaries required to protect their interests. *See, e.g.*, Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever A Fiduciary Duty To Disclose?*, 54 U. Pitt. L. Rev. 979, 985-87 (1993) ("*Fiduciary Responsibility*"); *see also Restatement (Second) of Trusts* §173, comment d (1959) ("[The trustee] is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person. . . . "). Thus, the duty to tell the truth lies at "the core of a fiduciary's responsibility" under ERISA. *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990); *see also Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983) (Posner, J.) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in [§404]. . . . ").[7]

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891 F.2d 1236, 1240 (6th Cir. 1989); *Petrilli v. Drechsel*, 910 F.2d 1441, 1448-49 (7th Cir. 1990); *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978).

[7] *Accord Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994); *Bixler v. Central Penn. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 133 (3d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 622 (1993); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2416 (1993); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988).

B. PETITIONER IS LIABLE UNDER ERISA FOR ACTIONS TAKEN TO IMPLEMENT ITS DECISIONS CONCERNING THE EMPLOYMENT BENEFIT PLANS

At common law, fiduciaries were prohibited from holding a position that created a conflict of interest (or even a potential conflict of interest) with beneficiaries. In the words of this Court:

> To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity." A fiduciary cannot contend "that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one."

NLRB v. Amax Coal Co., 453 U.S. 322, 329-30 (1981) (citations omitted). This was an absolute rule: Faced with a conflict, resignation or recusal were the only avenues available to the fiduciary. G.G. Bogert & G.T. Bogert, *The Law of Trusts & Trustees* §543, at 218, 264 (2d rev. ed. 1993).

Following the common law, in Section 406 of ERISA Congress enacted a detailed list of prohibited transactions, *see* 29 U.S.C. §1106, and "[t]he object of Section 406 was to make illegal per se the types of transactions that experience had shown to entail a high potential for abuse." *Cunningham*, 716 F.2d at 1464-65 (citation omitted). Bearing in mind the special relationship between plan sponsors and their plans, however, Congress enacted a limited exception to that common law rule: Under Section 408(c)(3) of ERISA, it is not a *per se* breach of fiduciary duty for a person to serve as a fiduciary and

also be an officer, employee, or other representative of a plan sponsor. *See* 29 U.S.C. §1108(c)(3); *Cunningham*, 716 F.2d at 1466 ("[I]n ERISA Congress departed from the absolute common law rule against fiduciaries' dual loyalties."). As Judge Friendly has stated:

> "Since . . . an employer will often be an administrator of his plan, or will function as a trustee or in some other fiduciary capacity, this provision creates a limited exception to the listed proscription against self-dealing. The exception is made in recognition of the *symbiotic relationship* existing between the employer and the plan covering his employees."

Bierwirth, 680 F.2d at 271 (citation omitted).

Section 408(c)(3), however, presents no license for corporate agents who are also plan fiduciaries to forsake their duties under ERISA in favor of loyalties to the corporation. To the contrary, when acting as plan fiduciaries corporate employees still have the same statutory obligation to discharge their duties "solely in the interest of the participants," with "care, skill, prudence, and diligence," and free from prohibited transactions – as plan fiduciaries who are not corporate employees. As this Court has stated:

> Although [Section] 408(c)(3) of ERISA permits a trustee of an employee benefit fund to serve as an agent or representative of the union or employer, that provision in no way limits the duty of such a person to follow the law's fiduciary standards while he is performing his responsibilities as trustee.

Amax Coal, 453 U.S. at 333 n.16. Thus, for corporate directors, officers, or employees who are *also* fiduciaries,

Section 408(c)(3) merely provides an exception to the rule that having dual positions, without more, is a *per se* breach of fiduciary duty.[8]

Since the wearing of "two hats" is permissible, *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991), the Department of Labor has endeavored to define the function performed by employer/fiduciaries in each of the roles:

> [I]n light of the voluntary nature of the private pension system governed by ERISA, the Department has concluded that there is a class of discretionary activities which relate to the formation, rather than the management, of plans. These so-called "settlor" functions include decisions relating to the establishment, termination and design of plans and are not fiduciary activities subject to Title I of ERISA.

[8] *See* ERISA Op. Ltr. (Jan. 31, 1994) ("[S]ection 408(c)(3) has no bearing on the applicability of the fiduciary duties set forth in [S]ection 404 of ERISA"). Exceptions to general policies are generally read narrowly. Thus, the Department of Labor stated in the above-referenced opinion letter that, notwithstanding Section 408(c)(3), a prohibited transaction under Section 406(b)(2) would still occur if a fiduciary's "dual loyalties . . . would prevent him from acting solely in the interests of the plan's participants. . . . " Similarly, this Court is

> inclined, generally, to tight reading of exemptions from comprehensive schemes of this kind, *see, e.g., Commissioner v. Clark*, 489 U.S. 726, 739-740 (1989) (when a general policy is qualified by an exception, the Court "usually reads the exception narrowly in order to preserve the primary operation of the [policy]"), *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (cautioning against extending exemptions "to other than those plainly and unmistakably within its terms,"). . . .

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, ___ U.S. ___, 114 S. Ct. 517, 524-25 (1993).

ERISA Op. Ltr. (Mar. 13, 1986), 13 Pens. Rep. (BNA) 472 (Mar. 17, 1986). In this case, Petitioner seeks a rule that would allow employer/fiduciaries to blur the clear distinction between these functions and thereby enable employer/fiduciaries to deceive with impunity and persuade participants to take a ruinous course designed solely for the employer's advantage.

Thus, the question is squarely presented: Was Petitioner acting as an ERISA fiduciary when *implementing* Project Sunshine and misrepresenting its impact on plan benefits? To answer this question, this Court should look first to the statutory definition of "fiduciary." *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 115 S. Ct. 1671, 1677 (1995) (the Court begins "any exercise of statutory construction with the text of the provision in question, and move[s] on, as need be, to the structure and purpose of the Act in which it occurs"). Indeed, to determine whether conduct is fiduciary in character, courts "examine first the language of the governing statute, guided not by 'a single sentence or member of a sentence, but looking to the provisions of the whole law, *and to its object and policy*.' " *John Hancock*, 114 S. Ct. at 523 (quoting *Pilot Life*, 481 U.S. at 51). ERISA defines a fiduciary as follows:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. §1002(21). This is a *functional* test in the sense that a person is a fiduciary whenever he, she, or it is performing *any* of the functions that make a person a fiduciary; indeed, the term "fiduciary" under ERISA is an expansive term. *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1459 (9th Cir. 1995). This Court has recently stated: "Congress commodiously imposed fiduciary standards on persons whose actions affect the amount of benefits . . . plan participants will receive." *John Hancock*, 114 S. Ct. at 524; *see also Mertens v. Hewitt Assocs.*, ___ U.S. ___, 113 S. Ct. 2063, 2066 (1993). Thus, when comparing ERISA to the common law, this Court has held that ERISA "expand[s] the universe of persons subject to fiduciary duties. . . . " *Id.* at 2071.

In applying the definition of "fiduciary" to distinguish between an employer's settlor and fiduciary functions, courts have distinguished between *deciding* to offer (or not offer) benefits, on one hand, and *implementing* that decision, on the other. For example, a quintessential business decision is the determination of employee compensation, including benefits. Nowhere in ERISA did Congress restrict an employer's choice regarding whether to offer benefits and, therefore, courts have taken care to leave that right unaffected. *See Berlin*, 858 F.2d at 1163-64. Likewise, an employer's decision to amend or terminate a plan is not governed by fiduciary standards of conduct. This Court recently stated:

> Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. *See Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (CA 6 1990) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan").

Curtiss-Wright Corp. v. Schoonejongen, ___ U.S. ___, 115 S. Ct. 1223, 1228 (1995). *Accord New York State Conference*, 115 S. Ct. at 1674 (ERISA "does not go about protecting plan participants and their beneficiaries by requiring employers to provide any given set of minimum benefits").

In sharp contrast, *implementing* the decision to adopt, amend, or terminate employee benefit plans is purely fiduciary conduct. The Department of Labor has stated:

> Although the *decision* to terminate is generally not subject to the fiduciary responsibility provision of ERISA, the Department has emphasized that activities undertaken to *implement* the termination decision are generally fiduciary in nature.

ERISA Op. Ltr. (Mar. 13, 1986), 13 Pens. Rep. (BNA) 472 (Mar. 17, 1986) (emphasis added). *Implementing* the modification or termination of a plan falls squarely within the definitions of "management" (*e.g.*, executive function) and "administration" (*e.g.*, techniques employed in achieving the objectives), which are part of the ERISA definition of "fiduciary."[9]

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[9] The courts have adopted this same distinction; in the words of the Ninth Circuit:

> Plaintiffs allege that Blue Cross breached its fiduciary duty by choosing annuity providers using an infirm bidding process that sacrificed participants' and beneficiaries' best interests to maximize the reversion of residual plan assets. . . . Blue Cross maintains that it did not breach its fiduciary duty to the Plan because purchasing annuities as part of a plan termination is not a fiduciary act.
>
> * * *

In addition, individuals and companies act as plan fiduciaries when making material misrepresentations when *implementing* decisions to offer, amend, or terminate benefits:

> [W]hile . . . the decision to offer MIPP benefits was a nonfiduciary business decision, we do not agree with the district court's conclusion that it logically follows that any communications or representations made prior to such a decision were also nonfiduciary. On the contrary, we hold that when serious consideration was given by MBT to *implementing* MIPP by making a second offering . . . , then MBT as the plan administrator and/or its Vice President of Personnel Grady, the plan fiduciary, had a fiduciary duty not to make misrepresentations . . . to potential plan participants concerning the second offering.

Berlin, 858 F.2d at 1163-64 (citations omitted).[10]

For example, an employer announcing a "one-time offer" of an early retirement plan could be held liable for

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> By alleging that Blue Cross breached its fiduciary duty in the selection of annuity providers, plaintiffs attack not the *decision* to terminate, but rather the *implementation* of the decision. We believe that this distinction is dispositive and hold that Blue Cross acted in a fiduciary capacity when choosing annuity providers to satisfy plan liabilities.

Waller v. Blue Cross of California, 32 F.3d 1337, 1341-42 (9th Cir. 1994) (emphasis in original).

[10] *See also Maez v. Mountain States Tel. & Tel., Inc.*, No. 93-1184, 1995 U.S. App. LEXIS 9155, *34-37 (10th Cir. April 19, 1995); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994); *Fischer*, 994 F.2d at 135; *Drennan*, 977 F.2d at 250-52.

breach of fiduciary duty if "such a predictive statement- . . . were a 'material misrepresentation.' " *Barnes*, 927 F.2d at 544 (citation omitted). Such "one-time offer" statements would be material misrepresentations if, for example, the employer was seriously considering a second offer. *Id.* Likewise, plan fiduciaries have a duty not to mislead employees as to the prospective adoption of a plan under serious consideration. *Vartanian*, 14 F.3d at 702; *Drennan*, 977 F.2d at 249. Thus, in a case involving a situation similar to the present suit, the Eleventh Circuit reasoned:

> It is not clear from the record whether Osborne misrepresented to the employees of Powhatan that they were insured for the health plan when, in fact, they were not. . . . Clearly, if Osborne did make such misrepresentations, he would have breached his fiduciary duty to the health plan. The district court, however, did not make a finding of fact in this regard. The district court's order holding Osborne personally liable was predicated solely on Osborne's decision not to pay the insurance premiums.
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> * * *
>
> [T]his decision by Osborne to pay bills other than the insurance premiums was not made in his capacity as fiduciary of the health plan, it was made as the president of the corporation. . . . *This distinction in the role of president of the corporation as opposed to the role as fiduciary of the plan does not diminish in any way the obligation of the fiduciary to keep the beneficiaries (employees) advised as to the status of the plan, insurance coverage, etc. . . . .*

Local Union 2134, United Mine Workers of America v. Powhatan Fuel, Inc., 828 F.2d 710, 713-14 (11th Cir. 1987) (emphasis added; citations omitted).[11]

In each of the above-referenced situations, courts determined that deciding to offer a plan or terminate a plan, or which bills to pay, were *business* decisions that did not, standing alone, involve a fiduciary function. The courts ruled, however, that in *implementing* those business decisions, the employers were subject to the fiduciary duties imposed under ERISA which require full and honest disclosure of *all* information that would have a material impact on the participants' own decisions or status. The courts have properly held that these acts constitute discretionary authority or control over the management or administration of the plans and, as such, are subject to the fiduciary duties provided under ERISA.

In the event that this Court concludes that Petitioner was *not* acting as an ERISA fiduciary when misrepresenting the viability of MCC and stating that the employee benefits provided by MCC would be the same as those provided by Petitioner, the jury verdict for Respondents on their common law claims should be reinstated. Specifically at trial, the jury returned a verdict for the Respondents on their common law claims for fraudulent misrepresentation and punitive damages. 25a, 44a, 45a, 112a, 113a. The District Court set aside the jury verdict for fraudulent misrepresentation as preempted by ERISA.

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[11] *Cf. Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 229 (3d Cir. 1989) ("[A]n employer's lawful termination decision, absent affirmative misrepresentations designed to mislead plan participants, is not governed by ERISA's standards of fiduciary duties.").

The court set aside the jury's award of punitive damages solely because such relief is *not* available under ERISA. *Id.* The Eighth Circuit upheld the District Court's rulings on these claims for the same reasons. (10a, 11a). Therefore, in the event that this Court decides that ERISA does not govern the complained of conduct, this case should be remanded to the District Court with instruction to reinstate the jury's verdicts and awards in favor of Respondents on their common law claims.

C. UNDER ERISA'S STATUTORY SCHEME, SUBSECTION 502(a)(3) PROVIDES THE RELIEF GRANTED BELOW

Violations of Sections 404(a) and 406 are prosecuted under Section 502(a), ERISA's main civil enforcement provision, which provides that a civil action may be brought, *first*, "by a participant or beneficiary" to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan," 29 U.S.C. §1132(a)(1)(B); *second*, by the Secretary of Labor "or by a participant, beneficiary, or fiduciary for appropriate relief under section 1109 of this title," 29 U.S.C. §1132(a)(2); and/or *third*, "by a participant, beneficiary, or fiduciary" to "enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or to "obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. §1132(a)(3)(A)-(B).

Given the express language of Section 502(a)(3) and Congress' importation of the common law of trusts when

it enacted ERISA, it is not surprising that the Third, Fifth, Sixth, Seventh, Eighth and District of Columbia Circuits have all recognized that ERISA permits a direct action for relief to an individual participant or beneficiary for breach of fiduciary duty.[12]

In *Russell*, this Court held that subsection 502(a)(2) of ERISA does not grant individual participants a right to recover extra-contractual damages, specifying that any remedy thereunder can only inure to the benefit of the plan. However, *Russell* specifically reserved the question of whether subsection 502(a)(3) grants participants and beneficiaries a right of action for direct relief.[13] Petitioner

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[12] *See In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, No. 94-1875, 1995 U.S. App. LEXIS 15921, at *32-*39 (3d Cir. June 28, 1995) ("*Unisys*"); *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 993 (7th Cir. 1993); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1336 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 812 (1992); *Warren v. Society Nat'l Bank*, 905 F.2d 975, 978-83 (6th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991); *Eddy*, 919 F.2d at 750. The Ninth Circuit, constrained by its decision in *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986), either recognizes the functional equivalent of a breach of fiduciary duty claim by imposing a constructive trust under federal common law in ERISA cases, *Waller*, 32 F.3d at 1340, or has held that such state law claims are *not* preempted by ERISA. *Amalgamated Clothing & Textiles Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1416-19 (9th Cir. 1988). *Accord Farr*, 1995 U.S. App. LEXIS 15705, at *9-*17.

[13] In *Russell*, the majority opinion stated that " 'we have no occasion to consider whether any other provision of ERISA [apart from subsection 502(a)(2)] authorizes recovery of extra contractual damages.' " 473 U.S. at 139 (citation omitted). The only pronouncement by this Court with respect to the propriety of claims under subsection 502(a)(3) is contained in Justice Brennan's concurrence in *Russell*, which was joined by three other Justices. After a thorough analysis of ERISA's language and

contends that recognition of such a right in subsection 502(a)(3) is inconsistent with *Russell* and would nullify this Court's interpretation of 502(a)(2). This makes no sense. Subsection 502(a)(3) grants participants and beneficiaries a right to equitable relief, not only for enforcement of the terms of the plan but also for violations of "*any provisions* of this subchapter." 29 U.S.C. §1132(a)(3)(B). The subchapter in which Section 502 is contained is entitled "Protection of Employee Benefit Rights" and consists of Section 2 through Section 515 of ERISA, 29 U.S.C. §§1001-1145.

Thus, subsection 502(a)(3) clearly includes suits brought to remedy violations of subsections 404(a) and 406, which both set forth the standards of conduct for plan fiduciaries. This conclusion inescapably follows from analyzing ERISA in a manner that is consistent with this Court's admonition to apply and give effect to the text of the statute while improving, if necessary, its object and policy. Congress enacted ERISA in order

> to provide the *full range* of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law.

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structure and a comprehensive review of the statute's legislative history, Justice Brennan concluded that subsection 503(a)(3) grants participants and beneficiaries a direct claim for breach of fiduciary duty. *Russell*, 473 U.S. at 151-52 (Brennan, J., concurring in the judgment).

S. Rep. No. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4638, 4871. At common law, the most significant procedural obstacle to effective enforcement of fiduciary responsibility was the rule that only plan trustees, as opposed to beneficiaries, could bring suits concerning trust property. *See* A. Scott & W. Fratchew, *The Law of Trusts*, §§281, 282 (1989). Given Congress' intention to remove such impediment to suits brought under ERISA for fiduciary breaches, it necessarily follows that subsections 409(a) and 502(a)(2) of ERISA were enacted in order to change the common law by providing, *inter alia*, plan participants and beneficiaries with a direct cause of action to remedy damage to the plan, without having to rely upon the named trustee to sue.

In contrast, while subsections 409(a) and 502(a)(2) remove procedural impediments to recovery on behalf of the plan, subsection 502(a)(3) gives effect to and broadens the above-referenced equitable remedies available in both state and federal courts. Specifically, it was well established at common law that participants and beneficiaries have the right to sue plan trustees for breach of fiduciary duty. *See Restatement (Second) of Trusts* §295, comment a. By enacting subsection 502(a)(3), Congress codified this common law right and provided protection to plan participants and beneficiaries by permitting suit against any fiduciaries.

This Court has warned against tampering with the carefully crafted enforcement scheme set forth in subsection 502(a) because ERISA contains an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' " *Russell*, 473 U.S. at 146-47 (quoting *Nachman Corp.*

v. Pension Benefit Guaranty Corp., 446 U.S. 359, 381 (1980)). Applying this principle, it is evident from its statutory language that subsection 502(a)(3) includes claims against plan fiduciaries; indeed, each part of subsection 502(a) expressly identifies and limits those with standing to bring the claims provided for thereunder.

For example, claims under subsection 502(a)(3) may be brought only "by a participant, beneficiary, or fiduciary." 29 U.S.C. §1132(a)(3). With regard to who are proper defendants, however, Congress chose not to limit those subject to suit in any manner, other than what is inherent in the nature of the claim itself. For example, claims under subsection 502(a)(2) are limited to fiduciary breaches (for which relief is provided by subsection 409) and may only be brought against fiduciaries. Subsection 502(a)(3), on the other hand, contains no limitations of those subject to suit thereunder. Thus, any decision prohibiting participants and beneficiaries – who are expressly given standing to sue – from bringing claims under subsection 502(a)(3) against fiduciaries and alleging a breach of their fiduciary duty would run afoul of carefully crafted and reticulated enforcement scheme.

Petitioner argues, (as it must) that claims for breach of fiduciary duty may be brought *only* under subsection 502(a)(3).[14] As this Court has held, however, this subsection provides relief only for the plan as a whole. *Russell*,

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[14] Petitioner's related contention that subsection 502(a)(3) is the remedial provision for violations of ERISA's regulatory provisions is erroneous. First, the "regulatory provisions" cited by Petitioner each do, in fact, have corresponding remedial provisions. For example, ERISA's reporting and disclosure requirements are enforced through application of Section 502(c), 29 U.S.C. 1132(c), which, in certain circumstances, imposes

473 U.S. at 138-144. Petitioner seeks to deprive participants and beneficiaries of *any* means to protect themselves against fiduciary breaches injuries flowing therefrom. While Petitioner, its *amici* and employers would presumably applaud leaving plan participants and beneficiaries without a remedy for fiduciary breach, ERISA's statutory text, legislative history and notions of simple justice require that employees and retirees have adequate remedies against such violations of federal law.

The remedies provided by subsection 502(a)(1) (to recover benefits due under a plan) and subsection 502(a)(2) (which recognizes a remedy running *only* to a plan) do *not* provide relief in the myriad situations in which a fiduciary commits a severe breach of the fiduciary duties established by ERISA.

For example, a participant, who is deceived by a fiduciary into waiving and signing away rights to benefits under the terms of a plan (or, in the instant case, into switching from one plan to another) may not have a claim

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monetary sanctions for a failure to furnish the information required by the reporting and disclosure provisions, and by Section 502(a), which "allows a participant to sue for appropriate relief" for violations of Section 105(a).

The illogical results compelled by Petitioner's proposed interpretation of Section 502(a) are most apparent when one considers the effect it would have on claims under Section 510, 29 U.S.C. §1140, for interference with protected rights. Under Petitioner's proposed reading of the statute, the most serious violations of Section 510 – those committed by a fiduciary, which also constitute breach of fiduciary duty – would not be remedied under Section 502(a)(3). Congress could not have intended such an illogical result.

under subsection 502(a)(1).[15] Under Petitioner's proposed interpretation of subsection 502(a)(3), such conduct would not be remedied by ERISA and any state law right of action would be preempted. *Unisys*, a case recently decided by the Third Circuit, provides another stark example of the kinds of egregious breaches of fiduciary duty that would go unremedied under Petitioner's proposed interpretation of ERISA. In that case, the employer-fiduciary, both in the summary plan description (among other documents) and in individual meetings and group presentations to employees, represented that post-retirement medical benefits would continue "for life." The Third Circuit found that this message was "confirmed repeatedly and systematically throughout the [organization], by all levels of management, in writing and verbally." 1995 U.S. App. LEXIS 15921, at *10. When defendants terminated these benefits, in an action brought by former employee participants, the court found that no claim existed under subsection 502(a)(1) because the plan contained a reservation of rights which permitted the employer to amend or terminate the plan at any time; thus, it held that plaintiffs could rely solely on subsection 502(a)(3). *Id.* at *32-*39.

The profound consequences of Petitioner's proposed interpretation of ERISA are apparent when one considers the following additional factual situations in which an ERISA fiduciary committed a breach of fiduciary duty

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[15] *Cf. Anweiler*, 3 F.3d at 989, 991-92 (a fiduciary misleads a participant and convinces him to sign a waiver of rights under an employee benefit plan without disclosing that the participant did not have to sign such waiver, it was not in the participant's best interests to do so, and it was revocable at any time).

that was *not* redressable under subsections 502(a)(1) or (a)(2):

• A fiduciary intentionally misleads a participant regarding his right under ERISA to continue, at the participant's expense, insurance coverage previously paid for by the employer as part of an employee welfare benefit plan. As a result, the participant fails to exercise these rights in a timely manner and loses insurance benefits.[16]

• A fiduciary deliberately lies about an employer's intentions to establish an early retirement incentive program and several employees leave the company immediately prior to its implementation and fail to qualify for benefits thereunder.[17]

• A fiduciary fails to follow a participant's instructions to change the beneficiary of his life insurance plan, with the result that his intended beneficiary fails to receive the proceeds of the policy upon his death.[18]

As Petitioner acknowledges, and as this Court held in *Russell*, 473 U.S. at 142-43, "the principal statutory duties imposed on the trustees relate to the proper management, administration and investment of fund assets," and, *inter*

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[16] *See Bixler*, 12 F.3d at 1300; *Eddy*, 919 F.2d at 750-52; *Howard v. Gleason Corp.*, 901 F.2d 1154, 1160 (2d Cir. 1990); *Iwans v. Aetna Life Ins. Corp.*, 855 F. Supp 579, 583 (D. Conn. 1994).

[17] *See Fischer*, 994 F.2d at 132; *Drennan*, 977 F.2d at 250; *Barns v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938, (1991); *Berlin*, 858 F.2d at 1162-64; *Hall v. United Technologies Corp.*, 1995 WL 20951 (D. Conn. Jan. 12, 1995).

[18] *See Simmons v. Southern Bell Tel. & Tel. Co.*, 940 F.2d 614, 616-17 (11th Cir. 1991).

alia, the avoidance of conflicts of interest. It is inconceivable that Congress would have gone to such great lengths to articulate the foregoing duties and yet provide no mechanism to enforce them.

D. PETITIONER BREACHED ITS FIDUCIARY DUTIES TO RESPONDENTS

As noted above, the federal courts have uniformly held that a fiduciary has a duty to convey correct and complete information material to a beneficiary's circumstances. This duty arises under Section 404(a) of ERISA, 29 U.S.C. §1104(a), which imposes on fiduciaries a duty to act solely in participants' interest and with care, skill, prudence, and diligence. As Justice Cardozo observed:

> The trustee is free to stand aloof, while others act, if all is equitable and fair. He cannot rid himself of the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the surface or lurking beneath the surface, but visible to his practiced eye.

Globe Woolen Co. v. Utica Gas & Elec. Co., 224 N.Y. 483, 489, 121 N.E. 378, 380 (N.Y. 1918) (*quoted in Eddy*, 919 F.2d at 752).

In the present case, Petitioner sought at every turn to misinform employees solely to serve its own interests. In addition to affirmatively deceiving participants, Petitioner made a calculated decision to withhold material information from participants in order to facilitate ridding M-F and Varity of liability for employee benefit obligations. 55a-56a, 63a-65a. Petitioner knew that such communications were materially misleading when they were prepared and distributed and that the employees

relied on the misrepresentations to their detriment. 65a. Thus, Petitioner breached its fiduciary duty to Respondents.

Petitioner argues that by setting forth certain disclosure and reporting duties,[19] ERISA implicitly excludes *any* fiduciary duty to communicate truthfully regarding plan information not expressly referred to in ERISA. Such an argument must fail because, as recently stated by the Third Circuit:

> [S]atisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed plan participants to communicate candidly if the plan administrator simultaneously or subsequently makes material misrepresentations to those whom the duty of loyalty and prudence are owed.

Unisys, 1995 U.S. App. LEXIS 15921, at *23. Put another way, plan fiduciaries are required to disclose information to participants concerning benefits as long as the disclosures "do not contradict or supplant ERISA's express reporting and disclosure provisions." *Acosta v. Pacific Enterprises*, 950 F.2d 611, 619 (9th Cir. 1991). Thus, a fiduciary's duty is not discharged by simply complying

[19] Generally, plan administrators must provide to participants a summary plan description, a summary description of material modifications, and a summary annual report. *See* 29 U.S.C. §§1022, 1024. Upon request, a participant is entitled to receive the complete annual report. *See* 29 U.S.C. §1104. Other notification requirements arise with respect to certain types of plans in certain circumstances. *See* 29 U.S.C. §1021(d).

with ERISA's express reporting and disclosure requirements. *See Eddy*, 919 F.2d at 780.

Indeed, ERISA does not expressly provide for the disclosure of a variety of information needed by participants to protect their interests. For example, as one commentatory has observed:

> Because ERISA's annual report and summary annual report requirements do not provide plan financial information to participants and beneficiaries until at least seven months after the close of a plan year, it is clear that they were not intended to provide timely information to participants and beneficiaries in all circumstances. Thus, imposing a fiduciary duty to disclose to participants information relating to plan investments in circumstances where it is crucial to enable them to protect their interests can be viewed as neither contradicting nor supplanting ERISA's express financial disclosure provisions.

Fiduciary Responsibility, 54 U. Pitt. L. Rev. at 1008. In addition, this Court has rejected the maxim *expressio unius est exclusio alterius* as often as it has used it, generally preferring more reliable means of statutory construction.[20] The maxim properly applies

> only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted

[20] *See Thunder Basin Coal Co. v. Reich*, ___ U.S. ___, 114 S. Ct. 771, 777 n.11 (1994); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983); *Shurtleff v. United States*, 189 U.S. 311, 316 (1903).

must be intended to have opposite and contrary treatment.

Ford v. United States, 273 U.S. 593, 611 (1927).

With respect to ERISA's disclosure requirements, there is no reasoned basis to infer that Congress authorized fiduciary misrepresentations and omissions of material information. A fiduciary's duty to refrain from making misrepresentations (and, indeed, affirmatively to impart material information necessary to protect the beneficiaries' interests), was well-established prior to the enactment of ERISA and falls within the scope of the affirmative statutory duties imposed on plan fiduciaries. To interpret that duty out of existence simply because the statute does not expressly provide for it in the disclosure section would be unfaithful to Congress' intent that fiduciary obligations devolve from the common law of trusts and violate ERISA's primary objectives of protecting and promoting the interests of employees and their beneficiaries, and "establishing standards of conduct, responsibility, and obligation for fiduciaries." 29 U.S.C. §1002(b)(1).

Petitioner's misrepresentations and deceptions violate the fiduciary's duties of undivided loyalty, care and prudence. Prohibiting such deception will in no way chill employers from offering employee benefits, but instead will cause fiduciaries to take care that when they speak they speak truthfully. Put differently, there is no question but that prior to ERISA's enactment Petitioner would have been subject to liability for the fraud or misrepresentation which the District Court determined they perpetrated. Because Petitioner's conduct relates to

employee benefit plans directly, however, ERISA preempts such common law causes of action. Thus, without the ability to protect their interests by bringing such claims under ERISA, plan participants and beneficiaries would be placed at the mercy of fiduciaries whose earnings are paid by plan sponsors. It is impossible to imagine that when enacting ERISA Congress intended to strip participants and beneficiaries of existing remedies against such deception directly relating to employee benefit plans. Congress intended exactly the opposite: Congress enacted ERISA to provide the full range of relief available in state and federal courts and to remove any procedural obstacles to enforcing fiduciary responsibilities.

CONCLUSION

Petitioner's proposed interpretation of Sections 404(a) and 502(a) of ERISA finds no support in its statutory language, structure, or legislative history. Equally important, such an interpretation would have a profound impact on the ability of participants and beneficiaries to obtain redress for egregious breaches of fiduciary duty. Because state law remedies are usually preempted by ERISA, Petitioner's reading would grant fiduciaries a license to lie, condone reckless and negligent conduct and permit fiduciaries to appropriate plan assets for their own purposes. Petitioner cannot seriously argue that in striking a balance between ERISA's primary goal of protecting participants and beneficiaries and its goal of

encouraging the formation of employee benefit plans, Congress intended such a result.

July 26, 1995

Respectfully submitted,

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No. 94-1471 (16)

In The
Supreme Court of the United States
October Term, 1995

VARITY CORPORATION,

Petitioner,

v.

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The National Association of Securities and Commercial Law Attorneys ("NASCAT") is an association of law firms and attorneys who litigate cases involving antitrust, commercial, consumer, employee and retiree benefits, environmental and securities fraud claims in federal and state courts. NASCAT's members represent victims of corporate abuse, fraudulent schemes and so-called "white-collar" criminal activity, including victims of the type of pension and benefits fraud at issue in this case. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent wrongful, fraudulent, deceptive and manipulative business practices.

Claims arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §1001, *et seq.*, are an important weapon used by NASCAT members to enforce employees and retirees' rights. Accordingly, with the written consent of the parties, NASCAT files its *amicus curiae* brief in support of Respondents and urges this Court to affirm the decision of the court below.[1]

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[1] The decision of the court below is reported as *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *cert. granted*, ___ U.S. ___, 115 S. Ct. 1792. Citations to the slip opinion reprinted in Petitioner's Appendix are stated herein as "___a."

INTRODUCTION AND SUMMARY OF ARGUMENT

As set forth in the undisputed findings of fact entered by the district court and affirmed by the Eighth Circuit Court of Appeals, Petitioner, through a scheme it code-named "Project Sunshine," induced Respondents to transfer their employment to Massey Combines Corporation ("MCC") for the purpose of ridding Massey-Ferguson, Inc. ("M-F") and Varity Corporation ("Varity") of substantial obligations for employee benefits. 54a, 57a, 62a, 64a-65a. Acting with intent to deceive, Petitioner made material misrepresentations and concealed material facts in order to induce its employees to cease participation in viable benefit plans and, instead, to join new ones that were doomed to fail. *Id.*

From the outset of its fraudulent scheme, Petitioner purposefully disseminated incomplete, confusing and deceptive communications regarding Project Sunshine.[2] Although it developed accurate and forthright communications concerning the plans and benefits thereunder, Petitioner opted *not* to disseminate them for fear that employees who obtained accurate and complete information

[2] The fact that Petitioner named the program "Project Sunshine," casts serious doubt over whether it took its fiduciary obligations under ERISA seriously or even understood the concept. The word "sunshine" is frequently used to refer to hopefulness for the future or openness and disclosure. *See* Webster's *Third New International Dictionary* 2292 (1986) (listing one definition of "sunshine" as "radiating optimism"); Government in the Sunshine Act, Pub. L. 94-409, 90 Stat. 1247, codified at 5 U.S.C. §552b (requiring that meetings of federal agencies "shall be open to public observation"); L. Brandeis, *Other People's Money* 62 (1914) ("[s]unlight is said to be the best of disinfectants").

would refuse to be transferred to MCC. 63a-64a. Petitioner misrepresented MCC's financial outlook and the nature of future employee benefits, anticipating and intending that employees would sign up for Project Sunshine, thereby ridding M-F and Verity of huge benefit liabilities and transferring the liabilities to a shell company that was earmarked for failure. 55a-56a, 63a-65a. Petitioner even assured participants that their benefits would remain unchanged, even though MCC was deliberately set up to fail. 64a. Petitioner knew that its communications were materially misleading when they were given and the employees relied on them to their detriment. 65a.

After hearing all of the evidence in this case, the trial court concluded as follows:

> Varity and Massey Ferguson were in no different a situation than any of the other agricultural equipment manufacturers experiencing tough financial constraints during this period. However, in the face of difficult financial times Varity disregarded existing law and devised a plan which dramatically cut its debt burden and heritage costs. Project Sunshine was nothing more than a brilliant manipulative effort to sever retiree welfare obligations which had become a burdensome load on a financially strapped company. Project Sunshine was a sucker punch on loyal employees who had given a lifetime of service to a company and who had been induced into believing that their benefits coverage could not be terminated once they retired. ERISA was enacted to prevent just such a maneuver as was undertaken in Project Sunshine.

114a.

Left with no other argument, Petitioner contends in this Court that it can escape liability for its deliberate misrepresentations because it supposedly made those misrepresentations while acting outside of its fiduciary capacity.[3] While it may have been a business decision (exempt from ERISA's fiduciary standards) for Petitioner to improve Varity's balance sheet by creating MCC and undercapitalizing it, Petitioner was acting as fiduciaries of both the old and new plans when it intentionally misled Respondents into "voluntarily" relinquishing participation in viable plans and induced them to join new ones that were destined to fail.[4]

Petitioner cynically submits that ERISA provides no remedy where (as here) a fiduciary issues false and misleading statements which result in harm to a participant or beneficiary, even though it knows that ERISA may well preempt any remedies that would otherwise be available under state law.[5] Petitioner's argument finds no support

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[3] In order to determine whether Petitioner acted as a fiduciary, the Court must examine the particular activity that is at issue and *not* Petitioner's self-proclaimed non-fiduciary status. *See Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1051 (1993).

[4] MCC adopted no employee benefits plan for the first year of the company's operation, at which point it adopted the M-F plan. Prior to that, MCC simply used the M-F plan. 76a. Throughout MCC's existence, Varity and M-F were fiduciaries of MCC's employee benefit plans, M-F's board of directors was the "named fiduciary" and M-F was the "administrator" and "plan sponsor." 78a-79a. Thus, Petitioner was a fiduciary of both the old and new plans.

[5] *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 (1987) (common law tort claims that "relate to" an employee benefit plan are preempted by ERISA); *Shaw v. Delta Airlines, Inc.*, 463

in ERISA's text, structure, or legislative history, and it is inconsistent with sound public policy. In this important case, which may well affect the rights and benefits owed to hundreds of thousands of employees and retirees, there is simply no question but that Petitioner breached its fiduciary duties to Respondents and that Respondents are entitled to the relief they were awarded. To hold otherwise would immunize fiduciaries from claims for egregious breaches of the duties they owe under ERISA to participants and beneficiaries of employee benefit plans.

ARGUMENT

A. THE EXISTENCE AND SCOPE OF FIDUCIARY DUTIES UNDER ERISA'S STATUTORY SCHEME: SECTION 404

Sections 404(a) and 406 of ERISA specify the basic duties of a fiduciary: A fiduciary must discharge his or her duties solely in the interest of the participants, for the exclusive purpose of providing benefits to participants,

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U.S. 85, 92 (1983) (ERISA's preemption provision is not limited to state laws addressing the subject matters specifically addressed by ERISA); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (same). *But see Farr v. U.S. West, Inc.*, No. 93-35086, 1995 U.S. App. LEXIS 15705 (9th Cir. June 26, 1995) (misrepresentations regarding the tax consequences of a lump sum withdrawal from pension plan not preempted); *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1405-06 (11th Cir. 1994) (fraud claim arising from employer's false statement that plant was being shut down held not preempted even though plaintiffs' damages may be affected by calculation of pension benefits), *cert. denied*, ___ U.S. ___, 115 S. Ct. 906 (1995).

with care, skill, prudence, and diligence. 29 U.S.C. §§ 1104(a), 1106. In the words of Judge Friendly, the obligations of a fiduciary under ERISA are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982) (citation omitted).

By enacting Section 404(a) and 406 of ERISA, Congress intended that fiduciary duties imposed under ERISA should parallel fiduciary duties owed at common law:

> [R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility.

Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985) (footnote omitted; emphasis in original).[6]

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[6] *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-14 (1989) (ERISA is to be construed under principles of trust law not to afford less protection to employees than they enjoyed before ERISA was enacted); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 152-53, 156-57 n.6 (1985); *Donovan v. Cunningham*, 716 F.2d 1455, 1464 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (ERISA's legislative history indicates that Congress intended to incorporate in §404 the "core principles of fiduciary conduct" that were developed in the common law of trusts, but with modifications appropriate for employee benefit plans); *see also Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 955 (D.C. Cir. 1985); *Mahoney v. Board of Trustees*, 973 F.2d 968, 971 (1st Cir. 1992) (Breyer, J.); *Bierwirth*, 754 F.2d at 1055; *McMahon v. McDowell*, 794 F.2d 100, 110 (3d Cir. 1986), *cert. denied*, 479 U.S. 971 (1986); *Witmeyer v. Kilroy*, 788 F.2d 1021, 1025 (4th Cir. 1986); *Cunningham*, 716 F.2d at 1464; *De Marco v. C & L Masonry, Inc.*, 891 F.2d 1236, 1240 (6th Cir. 1989); *Petrilli v. Drechsel*, 910 F.2d 1441, 1448-49 (7th Cir. 1990); *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978).

At common law, fiduciaries were required, at a minimum, to fully disclose all facts within their knowledge which beneficiaries required to protect their interests. *See, e.g.*, Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever A Fiduciary Duty To Disclose?*, 54 U. Pitt. L. Rev. 979, 985-87 (1993) ("*Fiduciary Responsibility*"); *see also Restatement (Second) of Trusts* §173, comment d (1959) ("[The trustee] is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person. . . . "). Thus, the duty to tell the truth lies at "the core of a fiduciary's responsibility" under ERISA. *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990); *see also Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983) (Posner, J.) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in [§404]. . . . ").[7]

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[7] *Accord Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994); *Bixler v. Central Penn. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 133 (3d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 622 (1993); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2416 (1993); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988).

B. PETITIONER IS LIABLE UNDER ERISA FOR ACTIONS TAKEN TO IMPLEMENT ITS DECISIONS CONCERNING THE EMPLOYMENT BENEFIT PLANS

At common law, fiduciaries were prohibited from holding a position that created a conflict of interest (or even a potential conflict of interest) with beneficiaries. In the words of this Court:

> To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity." A fiduciary cannot contend "that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one."

NLRB v. Amax Coal Co., 453 U.S. 322, 329-30 (1981) (citations omitted). This was an absolute rule: Faced with a conflict, resignation or recusal were the only avenues available to the fiduciary. G.G. Bogert & G.T. Bogert, *The Law of Trusts & Trustees* §543, at 218, 264 (2d rev. ed. 1993).

Following the common law, in Section 406 of ERISA Congress enacted a detailed list of prohibited transactions, *see* 29 U.S.C. §1106, and "[t]he object of Section 406 was to make illegal per se the types of transactions that experience had shown to entail a high potential for abuse." *Cunningham*, 716 F.2d at 1464-65 (citation omitted). Bearing in mind the special relationship between plan sponsors and their plans, however, Congress enacted a limited exception to that common law rule: Under Section 408(c)(3) of ERISA, it is not a *per se* breach of fiduciary duty for a person to serve as a fiduciary and

also be an officer, employee, or other representative of a plan sponsor. *See* 29 U.S.C. §1108(c)(3); *Cunningham*, 716 F.2d at 1466 ("[I]n ERISA Congress departed from the absolute common law rule against fiduciaries' dual loyalties."). As Judge Friendly has stated:

> "Since . . . an employer will often be an administrator of his plan, or will function as a trustee or in some other fiduciary capacity, this provision creates a limited exception to the listed proscription against self-dealing. The exception is made in recognition of the *symbiotic relationship* existing between the employer and the plan covering his employees."

Bierwirth, 680 F.2d at 271 (citation omitted).

Section 408(c)(3), however, presents no license for corporate agents who are also plan fiduciaries to forsake their duties under ERISA in favor of loyalties to the corporation. To the contrary, when acting as plan fiduciaries corporate employees still have the same statutory obligation to discharge their duties "solely in the interest of the participants," with "care, skill, prudence, and diligence," and free from prohibited transactions – as plan fiduciaries who are not corporate employees. As this Court has stated:

> Although [Section] 408(c)(3) of ERISA permits a trustee of an employee benefit fund to serve as an agent or representative of the union or employer, that provision in no way limits the duty of such a person to follow the law's fiduciary standards while he is performing his responsibilities as trustee.

Amax Coal, 453 U.S. at 333 n.16. Thus, for corporate directors, officers, or employees who are *also* fiduciaries,

Section 408(c)(3) merely provides an exception to the rule that having dual positions, without more, is a *per se* breach of fiduciary duty.[8]

Since the wearing of "two hats" is permissible, *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991), the Department of Labor has endeavored to define the function performed by employer/fiduciaries in each of the roles:

> [I]n light of the voluntary nature of the private pension system governed by ERISA, the Department has concluded that there is a class of discretionary activities which relate to the formation, rather than the management, of plans. These so-called "settlor" functions include decisions relating to the establishment,

[8] *See* ERISA Op. Ltr. (Jan. 31, 1994) ("[S]ection 408(c)(3) has no bearing on the applicability of the fiduciary duties set forth in [S]ection 404 of ERISA"). Exceptions to general policies are generally read narrowly. Thus, the Department of Labor stated in the above-referenced opinion letter that, notwithstanding Section 408(c)(3), a prohibited transaction under Section 406(b)(2) would still occur if a fiduciary's "dual loyalties . . . would prevent him from acting solely in the interests of the plan's participants. . . . " Similarly, this Court is

> inclined, generally, to tight reading of exemptions from comprehensive schemes of this kind, *see, e.g., Commissioner v. Clark*, 489 U.S. 726, 739-740 (1989) (when a general policy is qualified by an exception, the Court "usually reads the exception narrowly in order to preserve the primary operation of the [policy]"), *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (cautioning against extending exemptions "to other than those plainly and unmistakably within its terms,"). . . .

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, ___ U.S. ___, 114 S. Ct. 517, 524-25 (1993).

> termination and design of plans and are not fiduciary activities subject to Title I of ERISA.

ERISA Op. Ltr. (Mar. 13, 1986), 13 Pens. Rep. (BNA) 472 (Mar. 17, 1986). In this case, Petitioner seeks a rule that would allow employer/fiduciaries to blur the clear distinction between these functions and thereby enable employer/fiduciaries to deceive with impunity and persuade participants to take a ruinous course designed solely for the employer's advantage.

Thus, the question is squarely presented: Was Petitioner acting as an ERISA fiduciary when *implementing* Project Sunshine and misrepresenting its impact on plan benefits? To answer this question, this Court should look first to the statutory definition of "fiduciary." *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 115 S. Ct. 1671, 1677 (1995) (the Court begins "any exercise of statutory construction with the text of the provision in question, and move[s] on, as need be, to the structure and purpose of the Act in which it occurs"). Indeed, to determine whether conduct is fiduciary in character, courts "examine first the language of the governing statute, guided not by 'a single sentence or member of a sentence, but looking to the provisions of the whole law, *and to its object and policy*.' " *John Hancock*, 114 S. Ct. at 523 (quoting *Pilot Life*, 481 U.S. at 51). ERISA defines a fiduciary as follows:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. §1002(21). This is a *functional* test in the sense that a person is a fiduciary whenever he, she, or it is performing *any* of the functions that make a person a fiduciary; indeed, the term "fiduciary" under ERISA is an expansive term. *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1459 (9th Cir. 1995). This Court has recently stated: "Congress commodiously imposed fiduciary standards on persons whose actions affect the amount of benefits . . . plan participants will receive." *John Hancock*, 114 S. Ct. at 524; *see also Mertens v. Hewitt Assocs.*, ___ U.S. ___, 113 S. Ct. 2063, 2066 (1993). Thus, when comparing ERISA to the common law, this Court has held that ERISA "expand[s] the universe of persons subject to fiduciary duties. . . . " *Id.* at 2071.

In applying the definition of "fiduciary" to distinguish between an employer's settlor and fiduciary functions, courts have distinguished between *deciding* to offer (or not offer) benefits, on one hand, and *implementing* that decision, on the other. For example, a quintessential business decision is the determination of employee compensation, including benefits. Nowhere in ERISA did Congress restrict an employer's choice regarding whether to offer benefits and, therefore, courts have taken care to leave that right unaffected. *See Berlin*, 858 F.2d at 1163-64. Likewise, an employer's decision to amend or terminate a plan is not governed by fiduciary standards of conduct. This Court recently stated:

> Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. *See Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (CA 6 1990) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan").

Curtiss-Wright Corp. v. Schoonejongen, ___ U.S. ___, 115 S. Ct. 1223, 1228 (1995). *Accord New York State Conference*, 115 S. Ct. at 1674 (ERISA "does not go about protecting plan participants and their beneficiaries by requiring employers to provide any given set of minimum benefits").

In sharp contrast, *implementing* the decision to adopt, amend, or terminate employee benefit plans is purely fiduciary conduct. The Department of Labor has stated:

> Although the *decision* to terminate is generally not subject to the fiduciary responsibility provision of ERISA, the Department has emphasized that activities undertaken to *implement* the termination decision are generally fiduciary in nature.

ERISA Op. Ltr. (Mar. 13, 1986), 13 Pens. Rep. (BNA) 472 (Mar. 17, 1986) (emphasis added). *Implementing* the modification or termination of a plan falls squarely within the definitions of "management" (*e.g.*, executive function) and "administration" (*e.g.*, techniques employed in achieving the objectives), which are part of the ERISA definition of "fiduciary."[9]

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[9] The courts have adopted this same distinction; in the words of the Ninth Circuit:

> Plaintiffs allege that Blue Cross breached its fiduciary duty by choosing annuity providers using an infirm bidding process that sacrificed participants' and beneficiaries' best interests to maximize the reversion of residual plan assets. . . . Blue Cross maintains that it did not breach its fiduciary duty to the Plan because purchasing annuities as part of a plan termination is not a fiduciary act.
>
> * * *

In addition, individuals and companies act as plan fiduciaries when making material misrepresentations when *implementing* decisions to offer, amend, or terminate benefits:

> [W]hile . . . the decision to offer MIPP benefits was a nonfiduciary business decision, we do not agree with the district court's conclusion that it logically follows that any communications or representations made prior to such a decision were also nonfiduciary. On the contrary, we hold that when serious consideration was given by MBT to *implementing* MIPP by making a second offering . . . , then MBT as the plan administrator and/or its Vice President of Personnel Grady, the plan fiduciary, had a fiduciary duty not to make misrepresentations . . . to potential plan participants concerning the second offering.

Berlin, 858 F.2d at 1163-64 (citations omitted).[10]

For example, an employer announcing a "one-time offer" of an early retirement plan could be held liable for

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> By alleging that Blue Cross breached its fiduciary duty in the selection of annuity providers, plaintiffs attack not the *decision* to terminate, but rather the *implementation* of the decision. We believe that this distinction is dispositive and hold that Blue Cross acted in a fiduciary capacity when choosing annuity providers to satisfy plan liabilities.

Waller v. Blue Cross of California, 32 F.3d 1337, 1341-42 (9th Cir. 1994) (emphasis in original).

[10] *See also Maez v. Mountain States Tel. & Tel., Inc.*, No. 93-1184, 1995 U.S. App. LEXIS 9155, *34-37 (10th Cir. April 19, 1995); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994); *Fischer*, 994 F.2d at 135; *Drennan*, 977 F.2d at 250-52.

breach of fiduciary duty if "such a predictive statement . . . were a 'material misrepresentation.' " *Barnes*, 927 F.2d at 544 (citation omitted). Such "one-time offer" statements would be material misrepresentations if, for example, the employer was seriously considering a second offer. *Id.* Likewise, plan fiduciaries have a duty not to mislead employees as to the prospective adoption of a plan under serious consideration. *Vartanian*, 14 F.3d at 702; *Drennan*, 977 F.2d at 249. Thus, in a case involving a situation similar to the present suit, the Eleventh Circuit reasoned:

> It is not clear from the record whether Osborne misrepresented to the employees of Powhatan that they were insured for the health plan when, in fact, they were not. . . . Clearly, if Osborne did make such misrepresentations, he would have breached his fiduciary duty to the health plan. The district court, however, did not make a finding of fact in this regard. The district court's order holding Osborne personally liable was predicated solely on Osborne's decision not to pay the insurance premiums.
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> * * *
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> [T]his decision by Osborne to pay bills other than the insurance premiums was not made in his capacity as fiduciary of the health plan, it was made as the president of the corporation. . . . *This distinction in the role of president of the corporation as opposed to the role as fiduciary of the plan does not diminish in any way the obligation of the fiduciary to keep the beneficiaries (employees) advised as to the status of the plan, insurance coverage, etc.* . . . .

Local Union 2134, United Mine Workers of America v. Powhatan Fuel, Inc., 828 F.2d 710, 713-14 (11th Cir. 1987) (emphasis added; citations omitted).[11]

In each of the above-referenced situations, courts determined that deciding to offer a plan or terminate a plan, or which bills to pay, were *business* decisions that did not, standing alone, involve a fiduciary function. The courts ruled, however, that in *implementing* those business decisions, the employers were subject to the fiduciary duties imposed under ERISA which require full and honest disclosure of *all* information that would have a material impact on the participants' own decisions or status. The courts have properly held that these acts constitute discretionary authority or control over the management or administration of the plans and, as such, are subject to the fiduciary duties provided under ERISA.

In the event that this Court concludes that Petitioner was *not* acting as an ERISA fiduciary when misrepresenting the viability of MCC and stating that the employee benefits provided by MCC would be the same as those provided by Petitioner, the jury verdict for Respondents on their common law claims should be reinstated. Specifically at trial, the jury returned a verdict for the Respondents on their common law claims for fraudulent misrepresentation and punitive damages. 25a, 44a, 45a, 112a, 113a. The District Court set aside the jury verdict for fraudulent misrepresentation as preempted by ERISA.

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[11] *Cf. Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 229 (3d Cir. 1989) ("[A]n employer's lawful termination decision, absent affirmative misrepresentations designed to mislead plan participants, is not governed by ERISA's standards of fiduciary duties.").

The court set aside the jury's award of punitive damages solely because such relief is *not* available under ERISA. *Id*. The Eighth Circuit upheld the District Court's rulings on these claims for the same reasons. (10a, 11a). Therefore, in the event that this Court decides that ERISA does not govern the complained of conduct, this case should be remanded to the District Court with instruction to reinstate the jury's verdicts and awards in favor of Respondents on their common law claims.

C. UNDER ERISA'S STATUTORY SCHEME, SUBSECTION 502(a)(3) PROVIDES THE RELIEF GRANTED BELOW

Violations of Sections 404(a) and 406 are prosecuted under Section 502(a), ERISA's main civil enforcement provision, which provides that a civil action may be brought, *first*, "by a participant or beneficiary" to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan," 29 U.S.C. §1132(a)(1)(B); *second*, by the Secretary of Labor "or by a participant, beneficiary, or fiduciary for appropriate relief under section 1109 of this title," 29 U.S.C. §1132(a)(2); and/or *third*, "by a participant, beneficiary, or fiduciary" to "enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or to "obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. §1132(a)(3)(A)-(B).

Given the express language of Section 502(a)(3) and Congress' importation of the common law of trusts when

it enacted ERISA, it is not surprising that the Third, Fifth, Sixth, Seventh, Eighth and District of Columbia Circuits have all recognized that ERISA permits a direct action for relief to an individual participant or beneficiary for breach of fiduciary duty.[12]

In *Russell*, this Court held that subsection 502(a)(2) of ERISA does not grant individual participants a right to recover extra-contractual damages, specifying that any remedy thereunder can only inure to the benefit of the plan. However, *Russell* specifically reserved the question of whether subsection 502(a)(3) grants participants and beneficiaries a right of action for direct relief.[13] Petitioner

[12] *See In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, No. 94-1875, 1995 U.S. App. LEXIS 15921, at *32-*39 (3d Cir. June 28, 1995) ("*Unisys*"); *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 993 (7th Cir. 1993); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1336 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 812 (1992); *Warren v. Society Nat'l Bank*, 905 F.2d 975, 978-83 (6th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991); *Eddy*, 919 F.2d at 750. The Ninth Circuit, constrained by its decision in *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986), either recognizes the functional equivalent of a breach of fiduciary duty claim by imposing a constructive trust under federal common law in ERISA cases, *Waller*, 32 F.3d at 1340, or has held that such state law claims are *not* preempted by ERISA. *Amalgamated Clothing & Textiles Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1416-19 (9th Cir. 1988). *Accord Farr*, 1995 U.S. App. LEXIS 15705, at *9-*17.

[13] In *Russell*, the majority opinion stated that " 'we have no occasion to consider whether any other provision of ERISA [apart from subsection 502(a)(2)] authorizes recovery of extra contractual damages.' " 473 U.S. at 139 (citation omitted). The only pronouncement by this Court with respect to the propriety of claims under subsection 502(a)(3) is contained in Justice Brennan's concurrence in *Russell*, which was joined by three other Justices. After a thorough analysis of ERISA's language and

contends that recognition of such a right in subsection 502(a)(3) is inconsistent with *Russell* and would nullify this Court's interpretation of 502(a)(2). This makes no sense. Subsection 502(a)(3) grants participants and beneficiaries a right to equitable relief, not only for enforcement of the terms of the plan but also for violations of "*any provisions* of this subchapter." 29 U.S.C. §1132(a)(3)(B). The subchapter in which Section 502 is contained is entitled "Protection of Employee Benefit Rights" and consists of Section 2 through Section 515 of ERISA, 29 U.S.C. §§1001-1145.

Thus, subsection 502(a)(3) clearly includes suits brought to remedy violations of subsections 404(a) and 406, which both set forth the standards of conduct for plan fiduciaries. This conclusion inescapably follows from analyzing ERISA in a manner that is consistent with this Court's admonition to apply and give effect to the text of the statute while improving, if necessary, its object and policy. Congress enacted ERISA in order

> to provide the *full range* of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law.

structure and a comprehensive review of the statute's legislative history, Justice Brennan concluded that subsection 503(a)(3) grants participants and beneficiaries a direct claim for breach of fiduciary duty. *Russell*, 473 U.S. at 151-52 (Brennan, J., concurring in the judgment).

S. Rep. No. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4638, 4871. At common law, the most significant procedural obstacle to effective enforcement of fiduciary responsibility was the rule that only plan trustees, as opposed to beneficiaries, could bring suits concerning trust property. *See* A. Scott & W. Fratchew, *The Law of Trusts*, §§281, 282 (1989). Given Congress' intention to remove such impediment to suits brought under ERISA for fiduciary breaches, it necessarily follows that subsections 409(a) and 502(a)(2) of ERISA were enacted in order to change the common law by providing, *inter alia*, plan participants and beneficiaries with a direct cause of action to remedy damage to the plan, without having to rely upon the named trustee to sue.

In contrast, while subsections 409(a) and 502(a)(2) remove procedural impediments to recovery on behalf of the plan, subsection 502(a)(3) gives effect to and broadens the above-referenced equitable remedies available in both state and federal courts. Specifically, it was well established at common law that participants and beneficiaries have the right to sue plan trustees for breach of fiduciary duty. *See Restatement (Second) of Trusts* §295, comment a. By enacting subsection 502(a)(3), Congress codified this common law right and provided protection to plan participants and beneficiaries by permitting suit against any fiduciaries.

This Court has warned against tampering with the carefully crafted enforcement scheme set forth in subsection 502(a) because ERISA contains an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' " *Russell*, 473 U.S. at 146-47 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 381 (1980)). Applying this principle, it is evident from its statutory language that subsection 502(a)(3) includes claims against plan fiduciaries; indeed, each part of subsection 502(a) expressly identifies and limits those with standing to bring the claims provided for thereunder.

For example, claims under subsection 502(a)(3) may be brought only "by a participant, beneficiary, or fiduciary." 29 U.S.C. §1132(a)(3). With regard to who are proper defendants, however, Congress chose not to limit those subject to suit in any manner, other than what is inherent in the nature of the claim itself. For example, claims under subsection 502(a)(2) are limited to fiduciary breaches (for which relief is provided by subsection 409) and may only be brought against fiduciaries. Subsection 502(a)(3), on the other hand, contains no limitations of those subject to suit thereunder. Thus, any decision prohibiting participants and beneficiaries – who are expressly given standing to sue – from bringing claims under subsection 502(a)(3) against fiduciaries and alleging a breach of their fiduciary duty would run afoul of carefully crafted and reticulated enforcement scheme.

Petitioner argues, (as it must) that claims for breach of fiduciary duty may be brought *only* under subsection 502(a)(3).[14] As this Court has held, however, this subsection provides relief only for the plan as a whole. *Russell*,

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[14] Petitioner's related contention that subsection 502(a)(3) is the remedial provision for violations of ERISA's regulatory provisions is erroneous. First, the "regulatory provisions" cited by Petitioner each do, in fact, have corresponding remedial provisions. For example, ERISA's reporting and disclosure requirements are enforced through application of Section 502(c), 29 U.S.C. 1132(c), which, in certain circumstances, imposes

473 U.S. at 138-144. Petitioner seeks to deprive participants and beneficiaries of *any* means to protect themselves against fiduciary breaches injuries flowing therefrom. While Petitioner, its *amici* and employers would presumably applaud leaving plan participants and beneficiaries without a remedy for fiduciary breach, ERISA's statutory text, legislative history and notions of simple justice require that employees and retirees have adequate remedies against such violations of federal law.

The remedies provided by subsection 502(a)(1) (to recover benefits due under a plan) and subsection 502(a)(2) (which recognizes a remedy running *only* to a plan) do *not* provide relief in the myriad situations in which a fiduciary commits a severe breach of the fiduciary duties established by ERISA.

For example, a participant, who is deceived by a fiduciary into waiving and signing away rights to benefits under the terms of a plan (or, in the instant case, into switching from one plan to another) may not have a claim

monetary sanctions for a failure to furnish the information required by the reporting and disclosure provisions, and by Section 502(a), which "allows a participant to sue for appropriate relief" for violations of Section 105(a).

The illogical results compelled by Petitioner's proposed interpretation of Section 502(a) are most apparent when one considers the effect it would have on claims under Section 510, 29 U.S.C. §1140, for interference with protected rights. Under Petitioner's proposed reading of the statute, the most serious violations of Section 510 – those committed by a fiduciary, which also constitute breach of fiduciary duty – would not be remedied under Section 502(a)(3). Congress could not have intended such an illogical result.

under subsection 502(a)(1).[15] Under Petitioner's proposed interpretation of subsection 502(a)(3), such conduct would not be remedied by ERISA and any state law right of action would be preempted. *Unisys*, a case recently decided by the Third Circuit, provides another stark example of the kinds of egregious breaches of fiduciary duty that would go unremedied under Petitioner's proposed interpretation of ERISA. In that case, the employer-fiduciary, both in the summary plan description (among other documents) and in individual meetings and group presentations to employees, represented that post-retirement medical benefits would continue "for life." The Third Circuit found that this message was "confirmed repeatedly and systematically throughout the [organization], by all levels of management, in writing and verbally." 1995 U.S. App. LEXIS 15921, at *10. When defendants terminated these benefits, in an action brought by former employee participants, the court found that no claim existed under subsection 502(a)(1) because the plan contained a reservation of rights which permitted the employer to amend or terminate the plan at any time; thus, it held that plaintiffs could rely solely on subsection 502(a)(3). *Id.* at *32-*39.

The profound consequences of Petitioner's proposed interpretation of ERISA are apparent when one considers the following additional factual situations in which an ERISA fiduciary committed a breach of fiduciary duty

[15] *Cf. Anweiler*, 3 F.3d at 989, 991-92 (a fiduciary misleads a participant and convinces him to sign a waiver of rights under an employee benefit plan without disclosing that the participant did not have to sign such waiver, it was not in the participant's best interests to do so, and it was revocable at any time).

that was *not* redressable under subsections 502(a)(1) or (a)(2):

- A fiduciary intentionally misleads a participant regarding his right under ERISA to continue, at the participant's expense, insurance coverage previously paid for by the employer as part of an employee welfare benefit plan. As a result, the participant fails to exercise these rights in a timely manner and loses insurance benefits.[16]

- A fiduciary deliberately lies about an employer's intentions to establish an early retirement incentive program and several employees leave the company immediately prior to its implementation and fail to qualify for benefits thereunder.[17]

- A fiduciary fails to follow a participant's instructions to change the beneficiary of his life insurance plan, with the result that his intended beneficiary fails to receive the proceeds of the policy upon his death.[18]

As Petitioner acknowledges, and as this Court held in *Russell*, 473 U.S. at 142-43, "the principal statutory duties imposed on the trustees relate to the proper management, administration and investment of fund assets," and, *inter*

[16] *See Bixler*, 12 F.3d at 1300; *Eddy*, 919 F.2d at 750-52; *Howard v. Gleason Corp.*, 901 F.2d 1154, 1160 (2d Cir. 1990); *Iwans v. Aetna Life Ins. Corp.*, 855 F. Supp 579, 583 (D. Conn. 1994).

[17] *See Fischer*, 994 F.2d at 132; *Drennan*, 977 F.2d at 250; *Barns v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938, (1991); *Berlin*, 858 F.2d at 1162-64; *Hall v. United Technologies Corp.*, 1995 WL 20951 (D. Conn. Jan. 12, 1995).

[18] *See Simmons v. Southern Bell Tel. & Tel. Co.*, 940 F.2d 614, 616-17 (11th Cir. 1991).

alia, the avoidance of conflicts of interest. It is inconceivable that Congress would have gone to such great lengths to articulate the foregoing duties and yet provide no mechanism to enforce them.

D. PETITIONER BREACHED ITS FIDUCIARY DUTIES TO RESPONDENTS

As noted above, the federal courts have uniformly held that a fiduciary has a duty to convey correct and complete information material to a beneficiary's circumstances. This duty arises under Section 404(a) of ERISA, 29 U.S.C. §1104(a), which imposes on fiduciaries a duty to act solely in participants' interest and with care, skill, prudence, and diligence. As Justice Cardozo observed:

> The trustee is free to stand aloof, while others act, if all is equitable and fair. He cannot rid himself of the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the surface or lurking beneath the surface, but visible to his practiced eye.

Globe Woolen Co. v. Utica Gas & Elec. Co., 224 N.Y. 483, 489, 121 N.E. 378, 380 (N.Y. 1918) (*quoted in Eddy*, 919 F.2d at 752).

In the present case, Petitioner sought at every turn to misinform employees solely to serve its own interests. In addition to affirmatively deceiving participants, Petitioner made a calculated decision to withhold material information from participants in order to facilitate ridding M-F and Varity of liability for employee benefit obligations. 55a-56a, 63a-65a. Petitioner knew that such communications were materially misleading when they were prepared and distributed and that the employees

relied on the misrepresentations to their detriment. 65a. Thus, Petitioner breached its fiduciary duty to Respondents.

Petitioner argues that by setting forth certain disclosure and reporting duties,[19] ERISA implicitly excludes *any* fiduciary duty to communicate truthfully regarding plan information not expressly referred to in ERISA. Such an argument must fail because, as recently stated by the Third Circuit:

> [S]atisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed plan participants to communicate candidly if the plan administrator simultaneously or subsequently makes material misrepresentations to those whom the duty of loyalty and prudence are owed.

Unisys, 1995 U.S. App. LEXIS 15921, at *23. Put another way, plan fiduciaries are required to disclose information to participants concerning benefits as long as the disclosures "do not contradict or supplant ERISA's express reporting and disclosure provisions." *Acosta v. Pacific Enterprises*, 950 F.2d 611, 619 (9th Cir. 1991). Thus, a fiduciary's duty is not discharged by simply complying

[19] Generally, plan administrators must provide to participants a summary plan description, a summary description of material modifications, and a summary annual report. *See* 29 U.S.C. §§1022, 1024. Upon request, a participant is entitled to receive the complete annual report. *See* 29 U.S.C. §1104. Other notification requirements arise with respect to certain types of plans in certain circumstances. *See* 29 U.S.C. §1021(d).

with ERISA's express reporting and disclosure requirements. *See Eddy*, 919 F.2d at 780.

Indeed, ERISA does not expressly provide for the disclosure of a variety of information needed by participants to protect their interests. For example, as one commentatory has observed:

> Because ERISA's annual report and summary annual report requirements do not provide plan financial information to participants and beneficiaries until at least seven months after the close of a plan year, it is clear that they were not intended to provide timely information to participants and beneficiaries in all circumstances. Thus, imposing a fiduciary duty to disclose to participants information relating to plan investments in circumstances where it is crucial to enable them to protect their interests can be viewed as neither contradicting nor supplanting ERISA's express financial disclosure provisions.

Fiduciary Responsibility, 54 U. Pitt. L. Rev. at 1008. In addition, this Court has rejected the maxim *expressio unius est exclusio alterius* as often as it has used it, generally preferring more reliable means of statutory construction.[20] The maxim properly applies

> only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted

[20] *See Thunder Basin Coal Co. v. Reich*, ___ U.S. ___, 114 S. Ct. 771, 777 n.11 (1994); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983); *Shurtleff v. United States*, 189 U.S. 311, 316 (1903).

must be intended to have opposite and contrary treatment.

Ford v. United States, 273 U.S. 593, 611 (1927).

With respect to ERISA's disclosure requirements, there is no reasoned basis to infer that Congress authorized fiduciary misrepresentations and omissions of material information. A fiduciary's duty to refrain from making misrepresentations (and, indeed, affirmatively to impart material information necessary to protect the beneficiaries' interests), was well-established prior to the enactment of ERISA and falls within the scope of the affirmative statutory duties imposed on plan fiduciaries. To interpret that duty out of existence simply because the statute does not expressly provide for it in the disclosure section would be unfaithful to Congress' intent that fiduciary obligations devolve from the common law of trusts and violate ERISA's primary objectives of protecting and promoting the interests of employees and their beneficiaries, and "establishing standards of conduct, responsibility, and obligation for fiduciaries." 29 U.S.C. §1002(b)(1).

Petitioner's misrepresentations and deceptions violate the fiduciary's duties of undivided loyalty, care and prudence. Prohibiting such deception will in no way chill employers from offering employee benefits, but instead will cause fiduciaries to take care that when they speak they speak truthfully. Put differently, there is no question but that prior to ERISA's enactment Petitioner would have been subject to liability for the fraud or misrepresentation which the District Court determined they perpetrated. Because Petitioner's conduct relates to

employee benefit plans directly, however, ERISA preempts such common law causes of action. Thus, without the ability to protect their interests by bringing such claims under ERISA, plan participants and beneficiaries would be placed at the mercy of fiduciaries whose earnings are paid by plan sponsors. It is impossible to imagine that when enacting ERISA Congress intended to strip participants and beneficiaries of existing remedies against such deception directly relating to employee benefit plans. Congress intended exactly the opposite: Congress enacted ERISA to provide the full range of relief available in state and federal courts and to remove any procedural obstacles to enforcing fiduciary responsibilities.

CONCLUSION

Petitioner's proposed interpretation of Sections 404(a) and 502(a) of ERISA finds no support in its statutory language, structure, or legislative history. Equally important, such an interpretation would have a profound impact on the ability of participants and beneficiaries to obtain redress for egregious breaches of fiduciary duty. Because state law remedies are usually preempted by ERISA, Petitioner's reading would grant fiduciaries a license to lie, condone reckless and negligent conduct and permit fiduciaries to appropriate plan assets for their own purposes. Petitioner cannot seriously argue that in striking a balance between ERISA's primary goal of protecting participants and beneficiaries and its goal of

encouraging the formation of employee benefit plans, Congress intended such a result.

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